Supreme Court, U.S.
FILED
JUN 16 1997
OFFICE OF THE CLERK

No. 962000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MGM GRAND AIR, INC.,
Petitioner,

vs.

MARK MICELI, ANDREA MICELI,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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122 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Warsaw Convention a document which contains all of the information specified for a "passenger ticket" is sufficient or whether the Warsaw Convention additionally requires that a "passenger ticket" be in a particular format, consisting of coupons to be detached and returned to the carrier before boarding.

2. Whether after *Chan v. Korean Air Lines, Ltd.* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 the failure of the carrier to provide "adequate notice" to the passenger of the applicability of the Warsaw Convention to the flight deprives the carrier of the limitation on liability found in the Warsaw Convention.

3. Whether the California Court of Appeal erred in relying on *Warren v. Flying Tiger Line, Inc.* (2d Cir. 1965) 352 F.2d 494, *Mertens v. Flying Tiger Line, Inc.* (2d Cir. 1965) 341 F.2d 851 and *Block v. Compagnie National Air France* (5th Cir. 1967) 386 F.2d 323, cases whose reasoning was rejected by the United States Supreme Court in *Chan, supra* and thereby resurrected the erroneous doctrine that the Warsaw Convention requires that the passenger receive "adequate notice" of the applicability of the treaty.

LIST OF PARTIES

Petitioner : MGM GRAND AIR, INC., a corporation wholly owned by GRAND HOLDINGS, INC. — Defendant - Appellee *Miceli v. MGM Grand Air, Inc.* Court of Appeal of the State of California, Second Appellate District Case No. B 101950; *Miceli v. MGM Grand Air, Inc.* Los Angeles County Superior Court Case No. BC 110388.

Respondent : MARK MICELI and ANDREA MICELI — Plaintiffs - Appellants, *Miceli v. MGM Grand Air, Inc.* Court of Appeal of the State of California, Second Appellate District Case No. B 101950; *Miceli v. MGM Grand Air, Inc.* Los Angeles County Superior Court Case No. BC 110388.

CORPORATE AFFILIATIONS

MGM GRAND AIR, INC. is a corporation that is wholly owned by MGM GRAND, INC.

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PETITION FOR WRIT OF CERTIORARI

MGM GRAND AIR, INC. (hereinafter "MGM"), Petitioner herein, respectfully petitions the United States Supreme Court to issue a writ of certiorari to review the decision of the California Court of Appeal, Second Appellate District, Division Four filed December 12, 1996. Review of this decision was denied by the California Supreme Court by its order of March 19, 1997.

OPINIONS BELOW

This petition seeks review of the decision rendered herein by the California Court of Appeal, Second Appellate District, Division Four published in the Official Appellate Reports of the State of California as *Miceli* v. *MGM Grand Air, Inc.*, 51 Cal.App.4th 702; 59 Cal.Rptr.2d 311 (1996). (Apx. C) That decision was subsequently the subject of a Petition for Review in the California Supreme. On March 19, 1997, the California Supreme Court denied the petition for review. (Apx. E)

JURISDICTION

The decision of the California Court of Appeal, issued December 12, 1996, reversed summary judgment in favor of MGM entered by the Superior Court of the State of California for the County of Los Angeles on March 5, 1996. (Apx. A,B,G) The Order of the California Supreme Court denying MGM's Petition for Review was entered March 19, 1997 and the Notice of Remittitur was

served by the Court of Appeal on April 2, 1997. (Apx. F) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) in that it involves a matter of interpretation of a treaty entered into by the United States.

STATUTORY PROVISIONS

This case involves interpretation of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly referred to a "The Warsaw Convention." That treaty is set forth in full in the appendix hereto (Apx. H) The specific provision at the heart of this controversy is Article 3.

> (1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
> (a) The place and date of issue;
> (b) The place of departure and of destination;
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
> (d) The name and address of the carrier or carriers;
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention.
> (2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the

validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

STATEMENT OF THE CASE

This is an action for personal injuries. Plaintiff-Respondent, MARK MICELI (hereinafter "MICELI") has worked as a live stage performance video coordinator. His services were engaged to act as video director for Madonna's 1993 world tour denominated the "Girlie Show" tour. Mr. MICELI'S services in this respect were obtained through a contract between himself and a company called Music Tours, Inc.

Air transportation for the participants in the "Girlie Show" was arranged by a company called Music Guide, Inc. John Severson, Vice President of MGM GRAND AIR, INC. entered into a written charter contract on behalf of MGM GRAND AIR, INC. with Music Guide, Inc. for the necessary air transportation. That charter contract contained the date it was executed, the itinerary, including the initial boarding place in Montreal, the final destination in Los Angeles and the various cities and countries to be visited by the "Girlie Show" world tour. It also contained the name and address of MGM as the carrier and it was expressly agreed between MGM and Music Guide, Inc. that the carriage was subject to the terms of the Warsaw Convention. (Apx. I-18)

Pursuant to his agreement with Music Tour, Inc., MICELI acted as video director for the "Girlie Show." MICELI boarded the MGM GRAND AIR aircraft along with the rest of the tour participants in Montreal, Canada and was flown from there to San Juan, Puerto Rico. Presumably a concert was held in San Juan and MICELI, pursuant to his agreement with Music Tour to act as video director for the "Girlie Show," boarded the aircraft along with the rest of the tour participants in San Juan, Puerto Rico. The aircraft was bound for Buenos Aires, Argentina. Before reaching Buenos Aires and while MICELI was in the lavatory, the aircraft encountered turbulence. MICELI claims that he sustained serious personal injuries as a result.

MICELI contends that he was completely unaware of the arrangements between Music Guide, Inc. and Defendant MGM GRAND AIR, INC. He further contends that no passenger ticket was ever given to him.

MGM brought a motion for summary adjudication in the trial court based upon its tenth affirmative defense that MICELI's damages were limited by the Warsaw Convention to $75,000. The trial court granted MGM's motion. (Apx. A) MICELI filed a petition for writ of mandate seeking review of the summary adjudication which was denied. Thereafter, MGM brought a motion for summary judgment, permitting judgment to be taken against it and in favor of MICELI in the amount of $75,000. (Apx. B) The motion was granted and judgment

was entered in favor of MICELI in the sum of $75,000.[1] (Apx. G)

A timely appeal was filed by MICELI in which the Court of Appeal determined that the Charter Contract could not be a "passenger ticket." By so doing, the Court of Appeal has improperly added a format requirement for a "passenger ticket" which is not specified in the Warsaw Convention. The opinion of the Court of Appeal, filed December 12, 1996, was certified for publication and is, so far as MGM is able to determine, the only reported case in the United States to decide the question presented. *Miceli v. MGM Grand Air, Inc.* (1996) 51 Cal.App.4th 702, 59 Cal.Rptr.2d 311.

REASONS FOR GRANTING THE WRIT

1. Review by the United States Supreme Court is necessary to settle important questions of law regarding the application of The Warsaw Convention to international charter aircraft flights, an area of air transportation which the California Court of Appeal recognized as an "issue of fundamental importance to an increasing number of international air travelers who board charter flights." The California Court of Appeal erroneously found that the Charter Agreement could not be a passenger ticket and

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1. The underlying action is brought by MARK MICELI for personal injury and by ANDREA MICELI for Loss of Consortium. Judgment was entered for the plaintiffs jointly in the sum of $75,000.

resurrected a doctrine recently rejected by the United States Supreme Court; that the Warsaw Convention requires "adequate notice" of its provisions as a condition of its applicability.

2. Review by the United States Supreme Court is necessary to prevent misstatement, misinterpretation and erroneous application of law in that the opinion of the California Court of Appeal is one of first impression in California and indeed this nation and the errors found in that opinion will thus infuse themselves into the law of every state and jurisdiction, especially as the use of charter aircraft in international travel continues to expand.

3. Review by the United States Supreme Court is necessary to prevent misstatement, misinterpretation and erroneous application of law in that the opinion of the California Court of Appeal ignores the recent decision by this Court in *Chan v. Korean Air Lines, Ltd.* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 which held that the Warsaw Convention does not require that passengers receive notice of its terms. This Court specifically rejected that doctrine, disparaging the very cases relied upon by the California Court of Appeal in its opinion. Thus, unless the opinion of the California Court of Appeal is corrected, the erroneous doctrine will be perpetuated despite the contrary holding in *Chan, supra*.

I.
THE OPINION IMPROPERLY IMPLIES A FORMAT PROVISION IN AN INTERNATIONAL TREATY

The Warsaw Convention is an international treaty ratified by the United States and is therefore the Supreme Law of the Land. U.S. Constitution Art. VI. It applies to *all* international air travel. *Block v. Compagnie Nationale Air France* (5th Cir. 1967) 386 F.2d 323, *cert. denied*, (1968) 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363. Article 1, section (1) of the Warsaw Convention states:

> "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise."

Section (2) defines "international transportation" as meaning transportation where the place of departure and place of destination contemplated in the contract are in different countries which have adopted the Convention, or where the place of departure and place of destination are in the same country with a stopover in any other country. The charter contract here calls for departure from Montreal, Canada with a final destination of Los Angeles and with various intermediate stopovers. Where the charter of an aircraft for hire is for international travel, the Warsaw Convention applies as it would to an ordinary commercial flight. *Block v. Compagnie Nationale Air France* (5th Cir. 1967) 386 F.2d 323.

The Warsaw Convention provides for strict liability of air carriers for injuries to passengers which occur during international air transportation. Warsaw Convention, Article 17. In exchange, that liability is limited. Warsaw Convention, Article 22. The limitation prescribed by the Warsaw Convention has been increased to $75,000 USD by a collateral agreement required by the United States for air carriers operating in this country. This collateral agreement is commonly referred to as the "Montreal Agreement." See *In re: Air Disaster at Lockerbie, Scotland, etc.* (2d Cir. 1991) 928 F.2d 1267, 1270 fn.2.

The case before this Court involves the interpretation of Article 3 of the Warsaw Convention.

> "(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars: (a) The place and date of issue; (b) the place of departure and of destination; (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character; (d) The name and address of the carrier or carriers; (e) A statement that the transportation is subject to the rules relating to liability established by this convention.

> "(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."

In its opinion, the California Court of Appeal determined that the Charter Agreement, a document which contains all of the information required by Article 3, nonetheless could not be a "passenger ticket." The California Court of Appeal reasoned that a ticket must be issued to the specific passenger, that the passenger must surrender the passenger ticket to the carrier before boarding, showing thereby assent to the terms of the ticket. The California Court of Appeal thereby rejected MGM's argument that the Charter Agreement was in essence a single ticket for all of the passengers on the "Girlie Show" tour because in the opinion of the California Court of Appeal, MGM was required to issue "individual" tickets or lose the liability limits.

The Warsaw Convention does not specify any such requirements. Article 3 specifies only certain information be included on the ticket. Although the California Court of Appeal determined that a passenger ticket must be issued to the individual passenger, in the individual passenger's name and surrendered by the passenger before

boarding to qualify as a passenger ticket, *Article 3 does not even require that the passenger's name appear on the document!* There is no dispute that the Charter Contract contained all of the information required by Article 3. (Apx. I) There should therefore be no question that it qualifies as a passenger ticket. (The second question presented by this case, whether or not the "passenger ticket" was "delivered" to MICELI was not addressed by the California Court of Appeal since it had determined that the Charter Agreement was not a ticket.)

In *Chan v. Korean Air Lines, Ltd.* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 the United States Supreme Court discussed the requirements for a legally sufficient "passenger ticket" under Article 3 of the Warsaw Convention. This Court stated that any document would qualify as a "passenger ticket" unless it was a blank form with no information on it.

> "All that the second sentence of Article 3(2) requires in order to avoid its sanction is the "deliver[y]" of "a passenger ticket." Expanding this to mean "a passenger ticket in compliance with the requirements of this Convention" is rendered implausible by the first sentence of Article 3(2), which specifies that "[t]he ... irregularity ... of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention." It is clear from this (1) that an "irregularity" does not prevent a document from being a

> "passenger ticket"; and (2) that an "irregularity" in a passenger ticket does not eliminate the contractual damages limitation provided for by the Convention. "Irregularity" means the "[q]uality or state of not conforming to rule or law," Webster's Second International Dictionary (1950), and in the present context the word must surely refer to the rules established by the Convention, including the notice requirement. Thus, a delivered document does not fail to qualify as a "passenger ticket," and does not cause forfeiture of the damages limitation, merely because it contains a defective notice. **When Article 3(2), after making this much clear, continues (in the second sentence) "nevertheless, if a carrier accepts a passenger without a passenger ticket having been delivered, etc." it can only be referring to the carrier's failure to deliver any document whatever, or its delivery of a document whose shortcomings are so extensive that it cannot be reasonably be described as a "ticket" (for example, a mistakenly delivered blank form, with no data filled in.)"** *Chan v. Korean Air Lines, Ltd.* (1989) 490 U.S. 126, 128-129; 109 S.Ct. 1676, 104 L.Ed.2d 113 (emphasis added)

The Charter Agreement contains all of the information required by Article 3. In fact, it contains

substantially more information than required by Article 3, including the entire contract of carriage. The document which MGM asserts herein is the legally sufficient "passenger ticket" is arguably "irregular" in that it is fifteen pages long, however it is not a blank form with no data filled in. Thus, following *Chan* it cannot be said that the Charter Agreement cannot be a "passenger ticket" within the meaning of the Warsaw Convention.

The California Court of Appeal has seemingly improperly inserted a cultural or customary bias into its interpretation of The Warsaw Convention. The California Court of Appeal has assumed that the passenger tickets which we are all accustomed to receiving from a travel agent are the only type of documents which the writers of The Warsaw Convention had in mind when they used the phrase "passenger ticket." It is clear that the Warsaw Convention does not specify a format for a passenger ticket and what is required by that term must depend upon the time and place of usage.

> "At the time the Warsaw Conference was held, October 1929, civil aviation was in its infancy. The total airline operations in the five years period 1925 to 1929 — in domestic as well as foreign travel — were only 400 million passenger miles. The fatality rate was 45 per 100 million passenger miles. This compares with the rate of 0.55 fatalities per 100 million passenger miles in 1965. ... The larger airliners could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour

> and over stages of about 500 miles. The most advanced and popular United States aircraft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 500 miles ... Lindberg had flown the Atlantic only two years before. The sole international air carrier in the United States operated flights between Havana and Key West." *Block v. Compagnie Nationale Air France* (5th Cir. 1967) 386 F.2d 323, 326. (including fn. 3)

It should not be reasoned that, in 1929, the document which was envisioned as a "passenger ticket" is the document in general use in air travel today. Indeed, one ought not reason that the writers of the Warsaw Convention, being drawn from countries all over the world, collectively had a single vision of what a "passenger ticket" should look like. Further, the passenger tickets in general use today may have no resemblance to the passenger tickets in use in the next century. Even as the California Court of Appeal has decided that a passenger ticket must fit its notion of a passenger ticket, air carriers are taking full advantage of electronic "Internet" transactions to reserve and confirm passage on their flights without generating paper, so-called "ticket-less" travel in which boarding is gained by showing identification, not returning a coupon generated by the carrier. The document containing the traditional "ticket" information is generated and transmitted electronically and may be printed out or not at the discretion of the passenger. Under the decision of the

California Court of Appeal, this could not qualify as a "passenger ticket" even if it were shown to give the entire text of the Warsaw Convention, was proven to be delivered electronically and was specifically assented to by the passenger because it does not fit the format pre-envisioned by the California Court of Appeal and cannot be "torn off" at the gate upon entry to the aircraft. Having done so, the California Court of Appeal has violated rules of construction of international treaties, the Supreme Law of the Land.

> "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter, and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind. *The Amiable Isabella*, 6 Wheat. 1, 71, 5 L.Ed. 191 (1821)." *Chan, supra* at p. 135.

The decision of the California Court of Appeal improperly inserts into the Warsaw Convention a format requirement for a "passenger ticket" despite the clear language of this Court in *Chan* that any irregularity in a

such a document does not deprive the carrier of the liability limits.

II
THE COURT OF APPEAL OPINION RESURRECTS A DOCTRINE DISAVOWED BY THE U.S. SUPREME COURT

In its opinion, the California Court of Appeal opinion frames the issue for decision as:

> "Specifically, can a contract for charter between an international carrier and a third party charterer constitute a 'passenger ticket' within the meaning of the Warsaw Convention when the passenger has no relationship with the charterer, no knowledge of the contract, and no opportunity to see the contract or obtain notice of the conventions liability limits?"

In so phrasing the issue, MGM GRAND AIR, INC. contends the Court created errors of both fact and law in that there was, in fact, a relationship between MICELI and the charterer and in that the Warsaw Convention applies irrespective of whether or not a given passenger has notice of the limitation of liability. This Court in *Chan*, *supra* rejected the reasoning of the very cases relied upon by the California Court of Appeal. Specifically, this Court found that the Warsaw Convention applies to international transportation whether or not the passenger receives any adequate notice of its application to the travel. Thus, the issue before the California Court

of Appeal was whether or not the Charter Agreement qualifies as a passenger ticket under the Warsaw Convention and the fact that the "passenger has no relationship with the charterer, no knowledge of the contract, and no opportunity to see the contract or obtain notice of the conventions liability limits" is wholly irrelevant to that determination.

The specific question before this Court in *Chan, supra* was whether "Article 3 of the Warsaw Convention removes the protection of limited liability if a carrier fails to provide adequate notice of the Convention's liability limitation." *Chan, supra* at p. 126. This Court determined that failure to give adequate notice to the passenger did not remove the liability limits. The plaintiffs in that case relied upon several cases which held that delivery of the passenger ticket must be made in time for the passenger to have the opportunity to protect against the liability limits by purchasing additional insurance. The Supreme Court rejected that reasoning because the Warsaw Convention has no such requirement.

> "Although Article 3(1)(e) specifies that a passenger ticket shall contain "[a] statement that the transportation is subject to the rules relating to liability established by this convention" nothing in Article 3 or elsewhere in the Convention imposes a sanction for failure to provide an "adequate" statement. The only sanction in Article 3 appears in the second clause of Article 3(2), which subjects a carrier to unlimited liability if it "accepts a passenger without a

> passenger ticket having been delivered." Several courts have equated non-delivery of a ticket, for purposes of this provision, with delivery of a ticket that fails to provide adequate notice of the Warsaw limitation. ... We cannot accept this interpretation." *Chan, supra* at p. 127 - 128.

In specifying cases which erroneously held that inadequate notice was the equivalent of no notice, this Court identified two cases heavily relied upon by the California Court of Appeal in its opinion:

> "See also *Warren v. Flying Tiger line, Inc.*, 352 F.2d 494 (CA9 1965)(conditioning liability limitation upon delivery of tickets in such manner as to afford passengers a reasonable opportunity to take measures to protect against liability limitation); *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (CA2)(same), cert. denied, 382 U.S. 816, 86 S.Ct. 38, 15 L.Ed.2d 64 (1965)..." *Chan, supra* at p. 128.

Further, the case most heavily relied upon by the California Court of Appeal, *Block v. Compagnie Nationale Air France*, (5th Cir. 1967) 386 F.2d 323 relies upon those two cases to support part of its reasoning. Thus, the California Court of Appeal has resurrected the erroneous doctrine that the Warsaw Convention requires "adequate" notice as a condition of its applicability. Since this is the only published case on this point, this Court

should not allow the reasoning of these discredited opinions to be reintroduced into this area of law.

The California Court of Appeal opinion further compounds the problem in prolonging this discredited doctrine by confusing it in the only issue it decided, whether or not the Charter Agreement qualifies as a "passenger ticket." The totality of this case involves two questions:

> (1) Whether the Charter Agreement document complies with the necessary requirements of the Warsaw Convention; and
>
> (2) Whether it was delivered to MICELI.

While the California Court of Appeal purported to decide only the first question, the reasoning employed shows that its determination was based in part on the question of delivery. Such loose reasoning ought not become the only published opinion on the question of what constitutes a legally sufficient "passenger ticket" under the Warsaw Convention.

CONCLUSION

For all of the above reasons, Petitioner MGM GRAND AIR, INC. respectfully requests that this Court issue a writ of certiorari to the California Court of Appeal to review its decision and opinion in this action.

Respectfully submitted,

PETER P. BROTZEN
GREGORY L. ANDERSON
DWYER, DALY, BROTZEN & BRUNO, LLP
Attorneys for Petitioner and Defendant
MGM GRAND AIR, INC.

APPENDIX A

APPENDIX A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 09/21/95 DEPT 44

HONORABLE REGINALD A. DUNN JUDGE

L. MITCHELL, CSL Deputy Sheriff

BC110388

MARK MICELI, ET AL.

Plaintiffs

v.

MGM GRAND AIR, INC., ET AL.

Defendants.

NATURE OF PROCEEDINGS:

DEFENDANT MGM GRAND AIR, INC.'S MOTION FOR SUMMARY ADJUDICATION - SUBMITTED MATTER

The Court having taken the above Motion under submission on September 15, 1995, now rules as follows:

The Motion of MGM Grand Air, Inc. for an order for summary adjudication in its favor with regard to its 10th affirmative defense is granted.

The Court concludes that the charter contract is a ticket within the meaning of the Warsaw Convention. The charter

contract contains all of the information required by Article 3 of the Warsaw Convention. The contract agreement was signed by MGM, Inc., and by Music Guide Inc. The places of departure and destination including stopping places are set forth in attachment B. Delivery of the ticket (charter contract) to the person arranging the travel for the passengers is sufficient delivery under the Warsaw Convention. The Court finds that the incident complained of in the Plaintiffs' complaint is governed by the terms and conditions of the Warsaw Convention and that Plaintiffs' damages are limited therefore to $75,000.

APPENDIX B

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/21/96 DEPT 44

HONORABLE REGINALD A. DUNN JUDGE

L. MITCHELL, CSL Deputy Sheriff

BC110388

MARK MICELI, ET AL.
Plaintiffs

v.

MGM GRAND AIR, INC., ET AL.
Defendants.

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT, MGM GRAND AIR, INC., FOR JUDGMENT IN FAVOR OF PLAINTIFF

Motion is heard and granted: Judgment granted in favor of Plaintiffs Mark Miceli and Andrea Miceli jointly and against Defendant MGM Grand Air, Inc. in the sum of $75,000.

Moving Party to prepare judgment.

On the Court's own motion, Further Status Conference set March 25, 1996 is ordered advanced and vacated.

APPENDIX C

APPENDIX C

59 Cal.Rptr.2d 311, 51 Cal.App.4th 702, Miceli v. MGM Grand Air, Inc., (Cal.App. 2 Dist. 1996)

*311 59 Cal.Rptr.2d 311

51 Cal.App.4th 702, 96 Cal. Daily Op. Serv. 9019, 96 Daily Journal D.A.R. 14,919

Mark **MICELI** et al, Plaintiffs and Appellants,

v.

MGM GRAND AIR, INC., Defendant and Respondent

No. B101950

Court of Appeal, Second District, Division 4, California

Dec. 12, 1996.

International air passenger who was injured aboard chartered flight brought negligence action against air carrier. Passenger's wife asserted consortium claim. The Superior Court, Los Angeles County, No. BC 110388, Reginald A. Dunn, J., granted summary adjudication for carrier based on its affirmative defense that plaintiffs' damages were limited by Warsaw Convention to $75,000. Plaintiffs appealed. The Court of Appeal, Aranda, J., assigned, held that charter contract between air carrier and charterer is not "passenger ticket" for all who board aircraft under Warsaw Convention.

*312 Law Offices of [51 Cal.App.4th 704] Ian Herzog, Santa Monica, Evan D. Marshall, Rolling Meadows, IL, and Thomas Yuhas, Santa Monica, for Plaintiffs and Appellants.

Chase, Rotchford, Drukker & Bogust, Peter P. Brotzen and Gregory L. Anderson, Los Angeles, for Defendant and Respondent.

ARANDA, Associate Justice. (FN*)

PROCEDURAL HISTORY

Mark and Andrea **Miceli** (collectively referred to as "appellants") filed a complaint on August 9, 1994, for personal injuries sustained by Mark **Miceli** on October 28, 1993, when he was an international air passenger aboard a chartered **MGM Grand** Air, Inc. (hereinafter "MGM") flight which hit turbulent weather between San Juan, Puerto Rico and Buenos Aires, Argentina. MGM filed its answer and filed a Petition for Removal to the United States District Court for the Cental District of California. The District Court thereafter remanded the action to the Superior Court upon motion by the appellants.

On May 19, 1995, MGM served and filed a Motion for Summary Adjudication based upon its Tenth Affirmative Defense that appellants' damages were limited by the Warsaw Convention to $75,000. The motion was heard and argued on September 15, 1995, and on September 21, 1995, the trial court issued a minute order granting the motion. In October 1995 appellants filed a Petition for Writ of Mandate (Case Number B096355) seeking review of the summary adjudication order by extraordinary writ. The petition was denied by this court. Thereafter, on February 21, 1996, MGM moved for entry of judgment in favor of appellants in that amount. The motion was granted and judgment was entered on March 5, 1996. Appellants filed a timely Notice of Appeal.

[51 Cal.App.4th 705] STATEMENT OF FACTS.

Mark **Miceli** (**Miceli**) was employed as video director for "Madonna's Girlie Show" world tour pursuant to his contract

with Music Tours, Inc. On October 28, 1993, he was a passenger on a charter flight carrying the cast and crew of the tour aboard an **MGM Grand** Air plane. Another entity, Music Guide, Inc., had contracted with MGM for the charter.

***313** The charter originated in Los Angeles and had made a previous stop in Montreal for a concert before proceeding to San Juan. **Miceli** was not provided with a ticket or a baggage check. He alleges he had no knowledge of the charter agreement between Music Guide and MGM. The itinerary included stops in Argentina, Brazil and Mexico. It is undisputed that Canada, the United States, Argentina, Brazil and Mexico have all ratified the Warsaw Convention.

During a flight leg between Puerto Rico and Argentina and the aircraft encountered severe turbulence. **Miceli** alleges in his complaint that the flight crew flew the plane into an area of known high turbulence, notwithstanding the risks to the passengers. While he was in the lavatory, the plane was abruptly tossed about resulting in serious personal injuries to **Miceli**. His complaint alleges causes of action for negligence, willful misconduct and loss of consortium. The complaint further alleges loss of consortium by Andrea **Miceli** based upon the negligence or willful misconduct of MGM.

ISSUES

1. Was the trial court correct in ruling that the charter agreement between MGM and Music Guide constituted a "passenger ticket" for all aboard the flight within the meaning of the Warsaw Convention?

2. Did the trial court act in excess of its jurisdiction in summarily adjudicating the damage issue?

DISCUSSION

We note this appeal presents an issue of first impression in this state concerning the application of the Warsaw Convention, officially entitled "Convention for the Unification of Certain Rules Relating to International Transportation by Air" (hereinafter the "Warsaw Convention"). Specifically, can a contract for charter between an international carrier and a third party charterer constitute a "passenger ticket" within the meaning of the Warsaw Convention when the passenger [51 Cal.App.4th 706] has no relationship with the charter, no knowledge of the contract, and no opportunity to see the contract or obtain notice of the convention's liability limitations?

[1] The Warsaw Convention is an international treaty ratified by the United States in 1934 and is pursuant to the United States Constitution, the supreme law of the land. (U.S. Const., art. VI, cl. 2.) It applies to all international commercial air travel and limits the carrier's liability unless the plaintiff establishes "willful misconduct" on the part of the airline. (In re Air Crash Disaster (6th Cir. 1996) 86 F.3d 498, 544; *Pflug v. Egyptair Corp.* (2d Cir. 1992) 961 F.2d 26, 28; see *In re Air Disaster at Lockerbie, Scotland* (2nd Cir. 1991) 928 F.2d 1267 for a thorough history of the Warsaw Convention and its general applicability to air travel.)

[2] The Warsaw Convention also applies to all international charter flights. (*Block v. Compagnie Nationale*

Air France (5th Cir. 1967) 386 F.2d 323, 326, cert. den. (1968) 392 U.S. 905, 88 S.Ct. 2053, 20 L.Ed.2d 1363; *P.T. Airfast Services, Indonesia v. Superior Court* (1983) 139 Cal.App.3d 162, 166, 188 Cal.Rptr. 628.) Its language is clear and unambiguous. Article 1, section (1) states: "(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise."

[3] While the Warsaw Convention provides for strict liability of air carriers for injuries to passengers which occur during international air travel, that liability is limited. The limitation prescribed by the convention is now set at $75,000 by a collateral agreement, known as the "Montreal Agreement," which is required by the United States for all air carriers operating in this country. (*Block v. Compagnie Nationale Air France*, *supra*, at p. 325 fn. 1; *In re Air Crash Disaster*, *supra*, 86 F.3d at p. 544.)

[4] MGM argues that the liability limitations of the Warsaw Convention and Montreal Agreement are applicable in this case. ***314** Appellants argue that the limitations do not apply in this particular case. All parties agree we are dealing herein with an interpretation of Article 3 of the Warsaw Convention.

Article 3 reads as follows: '(1) For the transportation of passengers the carrier must deliver a *passenger ticket* which shall contain the following particulars: [¶](a) The place and date of issue; [¶](b) The place of departure and of destination; [¶](c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places

in case of necessity, and that if he exercises that right, the alteration shall not have the effect of [51 Cal.App.4th 707] depriving the transportation of its international character; [¶](d) The name and the address of the carrier or carriers; [¶](e) A statement that the transportation is subject to the rules relating to liability established by this convention. [¶](2) The absence, irregularity, or loss of that *passenger ticket* shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a *passenger ticket* having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." (Emphasis added.)

This case presents an issue of fundamental importance to an increasing number of international air travelers who board charter flights. If a passenger boards such a flight without having received a ticket from the carrier, tour director or charterer and thus fails to receive any notice of the Warsaw Convention liability limitations, is the fact that the charterer entered into a contract with the carrier specifying the places of departure and destination sufficient to satisfy the requirements of Article 3 of the convention that the carrier must "deliver a passenger ticket" prior to accepting the passenger as a condition of limited liability for personal injuries? The critical question is what precisely constitutes a "passenger ticket."

MGM successfully argued to the trial court that its contract with Music Guide, the charterer, constituted a "passenger ticket" for all aboard. Appellants argue that the consequence of the lack of delivery to the individual passenger of a

written instrument deprives that traveler of notice of liability limitation, thereby effectively eviscerating the notice requirement of the Warsaw Convention. We agree.

[5] The rule that words and phrases used in an enactment are presumed to have a meaning and that to perform a useful function they are to be given their common and ordinary meaning applies to the interpretation of international agreements as well. (*Suzuki Motor v. Superior Court* (1988) 200 Cal.App.3d 1476, 1481, 249 Cal.Rptr. 376 [interpreting the Hague Convention for service of process].) "In construing a treaty, the terms thereof are given their ordinary meaning in the context of the treaty and are interpreted, in accordance with that meaning, in the way that best fulfills the purpose of the treaty." (*Xerox Corp. v. U.S.* Fed.Cir. 1994) 41 F.3d 647, 652.)

We have in Article 3(2) of the Warsaw Convention plain language, i.e., "If the carrier accepts a passenger without a passenger ticket having been delivered, he shall not be entitled to avail himself of those provisions of this convention which limit his liability." If is conceded by all parties that Miceli did not receive any written instrument evidencing his [51 Cal.App.4th 708] contract of passage. MGM's assertion that a charter agreement containing certain information analogous to a ticket is unsupported by any case. In each case in which the Warsaw Convention has previously been held to limit liability of the air carrier, a ticket separate and distinct from the charter agreement was issued to each individual passenger. (See *Block v. Compagnie Nationale Air France, supra*, 386 F.2d 323; *Warren v. Flying Tiger Line, Inc.* (9th Cir. 1965) 341 F.2d 851.)

MGM argues that it need not issue passenger tickets to maintain its limited liability. Yet, the Second Circuit of the United States in Block emphasizes the necessity for "an *315 agreement between the carrier and passenger as to transportation and as to places of departure and arrival" as evidenced in a passenger ticket and concluded that "any agreement between the owner-carrier and a third person, the charterer, is irrelevant to Warsaw purposes." (Id. at p. 334, original italics.)

Block involved an Air France chartered flight by the Art Association of Atlanta. Air France dealt with the Art Association in making the flight details and the Association secured the passengers. Individual passenger tickets were issued by Air France to each passenger. The court upheld the Warsaw Convention limitations.

In limiting the air carrier's liability in conformance with the Warsaw Convention and the Montreal Agreement, the Second Circuit noted that "[t]he fatal flight developed out of three sets of contractual relationships: first, the relationship between Air France and the Atlanta Art Association created by their 'International Charter Flight Agreement'; second, the more informal set of relationships between the Art Association and the individual passengers; and third, the relationship between the individual passengers and Air France, *concluded by the airline's delivery to each passenger of a personal ticket for the flight*." (*Id.* at p. 335, emphasis added.)

In *Chan v. Korean Air Lines, Ltd.* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113, Justice Scalia, on behalf of a majority of the United States Supreme Court, clearly

dictates the consequences when an air carrier fails to issue individual passenger tickets as required by the Warsaw Convention. "The only sanction in Article 3 appears in the second clause of Article 3(2), which subjects a carrier to unlimited liability if it 'accepts a passenger without a passenger ticket having been delivered.' " (*Id.* at p. 127, 109 S.Ct. at p. 1680.)

In this case MGM argues that under *Chan* the charter agreement is a passenger ticket simply because it contained all the requirements of Article [51 Cal.App.4th 709] 3(1). MGM's position is that "[t]he fact that the 'ticket' is fifteen pages long and contains all the terms of the contract does not mean that it is not a ticket." While *Chan* holds that a passenger ticket "irregularity," i.e., use of eight-point type rather than the required ten-point type, is not fatal to its determination that it is a ticket under Warsaw Convention nomenclature, the irregularity claimed herein by respondent of substituting the charter agreement for a passenger ticket is preposterous.

The Warsaw Convention refers to the "contract" between carrier and passenger in some 13 provisions. See (*Block v. Compagnie Nationale Air France*, *supra*, 386 F.2d 323 at p. 332) for a discussion of a third party who can "contract" passage vis-a-vis a "passenger ticket." By contrast, the term "passenger ticket" appears only in Article 3. If the Warsaw Convention had wanted to use the terms interchangeably, it would most certainly have done so. We note that even if **Miceli** had received a copy of the 15-page charter agreement between MGM and Music Guide, receipt of the agreement in and of itself have given him any right to passage on the aircraft. **Miceli** was not a party to the contract and therefore

it created no relationship between him and the carrier or even between him and the charterer, which is the function of a ticket.

Tickets are issued to passengers, not to charterers. As is clear in *Block*, Air France became subject to the Convention not because it assumed contractual responsibility for the transportation of passengers and controlled the aircraft, but because it agreed to carry the particular passenger in question as evidenced by the issuance of a ticket to that passenger. (*Id.* at p. 353.) The passenger's possession and surrender of the ticket containing notice of the limitation of liability pursuant to the Warsaw Convention is proof of delivery and boarding of the aircraft is the passenger's acceptance of the terms therein, including any liability limitations imposed thereon.

We therefore hold that the charter contract between the air carrier and the charterer does not limit the air carrier's liability to third parties absent the issuance of a "passenger ***316.** ticket" meeting the requirements of the Warsaw Convention. We further hold that the charter agreement is not a "passenger ticket" for all who board an aircraft under the Warsaw Convention. In this particular situation MGM "accept[ed] a passenger without a passenger ticket having been delivered." Since MGM did not adhere to the provisions of the Convention by issuing individual "passenger tickets," it is thereby "not entitled to avail [itself] of those provisions of the Convention which limit its liability."

Having decided the first issue herein, there is no need for our consideration of the second issue.

[51 Cal.App.4th 710] CONCLUSION

The judgment herein is reversed. The matter is remanded to the trial court for further action in accord with this decision. Costs are awarded to appellants.

CHARLES S. VOGEL, P.J., and EPSTEIN, J., concur.

FN* Assigned by the Chairperson of the Judicial Council.

APPENDIX D

APPENDIX D

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 4 DATE: 01/08/97

Chase, Rotchford, Drukker & Bogust
Peter P. Brotzen
700 So. Flower Street
Suite 500
Los Angeles, CA 90017

RE: Miceli, Mark
vs.
MGM Grand Air, Inc.
2 Civil B101950
Los Angeles No. BC 097689

THE COURT:

Petition for rehearing denied.

APPENDIX E

APPENDIX E

SUPREME COURT
FILED
March 19, 1997
Robert Wandruff Clerk
DEPUTY

Second Appellate District, Division Four, No. B101950
S058566
IN THE SUPREME COURT OF CALIFORNIA

MARK MICELI, ET AL., Appellants

v.

MGM GRAND AIR, INC. Respondent

Respondent's petition for review DENIED

GEORGE

Chief Justice

APPENDIX F

APPENDIX F

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 4

Chase, Rotchford, Drukker & Bogust
Peter P. Brotzen
700 So. Flower Street
Suite 500
Los Angeles, CA 90017

RE: Miceli, Mark
vs.
MGM Grand Air, Inc.
2 Civil B101950
Los Angeles No. BC 097689

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 12/12/96 is now final.

** Reversed & Remanded To Trial Court W/Directions. **

Appellant(s) To Recover Costs On Appeal.

April 2, 1997
Joseph A. Lane, Clerk

APPENDIX G

APPENDIX G

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

FILED
March 5, 1996
Clerk

MARK MICELI, ANDREA MICELI,

Plaintiffs,

vs.

MGM GRAND AIR, INC., a corporation,
DOE 1, DOE 2, DOE 3, DOE 4, DOE 5,
DOE 6, and DOES 7 through 50, inclusive,

Defendants.

Case No. BC 110 388
JUDGMENT IN FAVOR OF PLAINTIFFS

On February 21, 1996, the Motion by Defendant MGM GRAND AIR, INC. for Judgment in Favor of Plaintiffs came on for hearing in Department 44 of this Court, the Honorable Reginald Dunn, Judge of the Superior Court presiding. Plaintiffs and Defendant appeared through their attorneys of record.

Upon consideration of the moving papers and there being no Opposition made by Plaintiffs, GOOD CAUSE appearing therefore, the Court granted Defendant's Motion. Therefore:

IT IS ADJUDGED, ORDERED AND DECREED:

1. That Plaintiffs MARK MICELI and ANDREA MICELI recover from Defendant MGM GRAND AIR, INC. the total sum of Seventy Five Thousand dollars ($75,000.00);

2. That the clerk of the court shall enter said judgment forthwith.

Dated: March 5, 1996

REGINALD A. DUNN
Honorable Reginald Dunn,
Judge of the Superior Court

APPENDIX H

APPENDIX H

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR ("WARSAW CONVENTION")

Concluded at Warsaw October 12, 1929. And Entered Into Force For The United States October 29, 1934, Subject To A Reservation.

The President of the German Reich, the Federal President of the Republic of Austria, His Majesty the King of the Belgians, the President of the United States of Brazil, His Majesty the King of the Bulgarians, the President of the Nationalist Government of China, His Majesty the king of Denmark and Iceland, His Majesty the King of Egypt, His Majesty the King of Spain, the Chief of State of the Republic of Estonia, the President of the Republic of Finland, the President of the French Republic, His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, the President of the Hellenic Republic, His Most Serene Highness the Regent of the Kingdom of Hungary, His Majesty the King of Italy, His Majesty the Emperor of Japan, the President of the Republic of Latvia, Her Royal Highness the Grand Duchess of Luxemburg, the President of the United Mexican States, His Majesty the King of Norway, Her Majesty the Queen of the Netherlands, the President of the Republic of Poland, His Majesty the King of Rumania, His Majesty the King of Sweden, the Swiss Federal Council, the President of the

Czechoslovak Republic, the Central Executive Committee of the Union of Soviet Socialist Republics, the President of the United States of Venezuela, His Majesty the King of Yugoslavia:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE-DEFINITIONS

ARTICLE 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be

deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

ARTICLE 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

Section I - Passenger Ticket

ARTICLE 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the carrier or carriers;

(e) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

Section II - Baggage Check

ARTICLE 4

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(a) The place and date of issue;

(b) The place of departure and of destination;

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage check does not contain the particulars set out at (d), (f), and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

Section III - Air Waybill

ARTICLE 5

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "Air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

ARTICLE 6

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handled by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

ARTICLE 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

ARTICLE 8

The air waybill shall contain the following particulars:

(a) The place and date of its execution;

(b) The place of departure and of destination;

(c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(d) The name and address of the consignor;

(e) The name and address of the first carrier;

(f) The name and address of the consignee, if the case so requires;

(g) The nature of the goods;

(h) The number of the packages, the method of packing, and the particular marks or numbers upon them;

(i) The weight, the quantity, the volume, or dimensions of the goods;

(j) The apparent condition of the goods and of the packing;

(k) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

(l) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

(m) The amount of the value declared in accordance with article 22(2);

(n) The number of parts of the air waybill;

(o) The documents handed to the carrier to accompany the air waybill;

(p) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;

(q) A statement that the transportation is subject to the rules relating to liability established by this convention.

ARTICLE 9

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

ARTICLE 10

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.

(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

ARTICLE 11

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.

(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

ARTICLE 12

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise

this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.

(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

ARTICLE 13

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.

(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee

shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

ARTICLE 14

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

ARTICLE 15

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

ARTICLE 16

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III. LIABILITY OF THE CARRIER

ARTICLE 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

ARTICLE 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

ARTICLE 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

ARTICLE 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

ARTICLE 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

ARTICLE 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250

francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65-1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

ARTICLE 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

ARTICLE 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out by this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

ARTICLE 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

ARTICLE 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

ARTICLE 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

ARTICLE 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

ARTICLE 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

ARTICLE 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of

transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

ARTICLE 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

CHAPTER V. GENERAL AND FINAL PROVISIONS

ARTICLE 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration causes shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

ARTICLE 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

ARTICLE 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

ARTICLE 35

The expression "days" when used in this convention means current days, not working days.

ARTICLE 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

ARTICLE 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after deposit.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

ARTICLE 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as

regards the party which shall have proceeded to denunciation.

ARTICLE 40

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

ARTICLE 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

ADDITIONAL PROTOCOL WITH REFERENCE TO ARTICLE 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.

[Adherence to this treaty on part of United States was proclaimed by the President on October 29, 1934. 49 Stat. 3000]

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory Notes:

The Warsaw Convention was amended by the Protocol signed at the Hague, Netherlands, in 1955 which provided for liability limitations of approximately $16,000. This protocol was never ratified by the United States.

Other Provisions:

Parties. The parties to the Convention for the Unification of Certain Rules Relating to International Transportation by Air, with Additional Protocol are:

Afghanistan
Algeria
Antigua & Barbuda 1
Argentina
Australia 2
Austria
Bahamas, The
Bangladesh
Barbados
Belgium
Benin
Botswana
Brazil
Bulgaria
Burma
Cameroon
Canada 3
Chile 3
China
Colombia
Congo
Cuba 3
Cyprus
Czechoslovakia
Denmark, not including Greenland
Dominican Rep.
Ecuador
Egypt
Ethiopia
Fiji
Finland
France, including French colonies
Gabon
Gambia, The 1
German Dem. Rep. 4
Germany, Fed. Rep.
Ghana 1
Greece
Grenada 1
Guinea
Guyana 1
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Ivory Coast
Jamaica 1
Japan
Kenya
Kiribati 1
Korea, Dem. People's Rep.
Kuwait
Laos
Latvia
Lebanon
Lesotho
Liberia

Libya
Liechtenstein
Luxembourg
Madagascar
Malawi
Malaysia
Mali
Malta 1
Mauritania
Mauritius 1
Mexico
Mongolia
Morocco
Nauru
Nepal
Netherlands 5
New Zealand
Niger
Nigeria
Norway
Oman
Pakistan 3
Papua New Guinea
Paraguay
Philippines
Poland
Portugal
Romania
Rwanda
St. Lucia 1
Saudi Arabia
Senegal
Seychelles 1
Sierra Leone
Singapore
Solomon Is. 1
South Africa 6
Spain
Sri Lanka
Sudan
Suriname 1
Swaziland 1
Sweden
Switzerland
Syrian Arab Rep.
Tanzania
Tonga
Trinidad & Tobago 1
Tunisia
Turkey
Tuvalu 1
Uganda
Union of Soviet Socialist Reps.
United Kingdom 7
United States 3
Upper Volta
Uruguay
Venezuela
Viet-Nam, Rep 8.
Western Samoa
Yemen (Aden) 1
Yugoslavia
Zaire
Zambia
Zimbabwe 1

NOTES:

1 See under country heading in the bilateral section for information concerning acceptance of treaty obligations.
2 Extended to Norfolk Island.
3 With reservation.
4 Applicable to Land Berlin.
5 Extended to Curacao.
6 Extended to Namibia.
7 Extended to Ascension Islands, Bermuda, British Virgin Islands, Brunei, Caicos, Cayman Islands, Channel Islands, Falkland Islands and dependencies, Gibraltar, Hong Kong, Isle of Man, Montserrat, St. Christopher-Nevis, St. Helena, and Turks. Also extended to Belize; continued application not yet determined.
8 See footnote 4 under AGRICULTURE: agreement of January 25, 1924 (26 UST 1840; TIAS 8141; 57 LNTS 135).

Approval of increases in liability limitations of Warsaw Convention and Hague Protocol. The following is the order of the Civil Aeronautics Board adopted May 13, 1966 approving increases in liability limitations of Warsaw Convention and Hague Protocol:

> The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation.

The United States became a party to the Convention in 1934, and eventually over 90 countries likewise became parties to the Convention.[2]

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2. The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

APPENDIX I

APPENDIX I

MGM GRAND AIR, INC.
1500 Rosecrans Avenue
Suite 350
Manhattan Beach, California 90266

SINGLE ENTITY CHARTER FLIGHT CONTRACT NO.: 93-055 (herein referred to as "Contract")

AGREEMENT made as of August 27, 1993 between MGM GRAND AIR, INC. with its principal office at 1500 Rosecrans Ave., Suite 350, Manhattan Beach, CA 90266, (herein referred to as "MGM GRAND AIR") and MUSIC GUIDE, INC. with its principal office at 1775 Broadway - 7th Floor, New York NY 10019 (herein referred to as "Charterer").

WHEREAS, the Charterer has requested MGM GRAND AIR to provide aircraft on charter hereinafter described for the purpose of performing Single Entity Charters; and

WHEREAS, MGM GRAND AIR and Charterer are willing and intend to comply with the applicable provisions of the charter regulations of the United States Department of Transportation (hereinafter "DOT") and other applicable

MGM GRAND AIR _____

CHARTERER _____

governmental regulations; and

WHEREAS, MGM GRAND AIR has agreed to provide said aircraft upon the terms and conditions appearing hereinafter; NOW IT IS HEREBY AGREED by and between the parties hereto, for and in consideration of the mutual promises and covenants hereinafter made, as follows:

ARTICLE 1: CHARTERED AIRCRAFT

1.1 MGM GRAND AIR shall provide aircraft (hereinafter "Chartered Aircraft" or "Aircraft") as specified in the Single Entity Charter Agreement Schedule(s) hereinafter "Schedule(s)") attached hereto and made a part hereof. Such aircraft shall have characteristics as specified in that Schedule(s).

1.2 In the event MGM GRAND AIR deems it impossible to provide the Charterer with the Chartered Aircraft due to adverse meteorological conditions or operational or mechanical reasons, MGM GRAND AIR may without notice and without liability undertake, at its option, to:

(a) Accommodate the passengers and baggage on available scheduled or charter service to the extent not inconsistent with the laws or regulations of the United States; or

(b) Substitute aircraft of another type or of another carrier or carriers fit for equivalent transportation; provided,

however, in no event shall the charges be higher than the applicable charges for the Aircraft originally chartered.

1.3 The Chartered Aircraft shall at all times be under the exclusive command and control of the Captain of the Aircraft. The Captain shall have complete discretion with regard to matters relating to the safe and legal operation of the aircraft including issues concerning the load carried, its distribution, the route to be flown, the time of departure from original point and the intermediate point(s), when and if the flight shall be undertaken and where landings shall be made. The Charterer and all passengers shall accept all such decisions as final and shall strictly comply with all orders issued by the Captain.

ARTICLE 2: REPRESENTATION OF CHARTERER AS TO SINGLE ENTITY NATURE OF CHARTER

Charterer hereby represents to MGM GRAND AIR that Charterer is paying the entire charter price for the transportation contracted for hereunder and that none of the passengers is paying, or will pay, directly or indirectly, any part of the charter price. Charterer hereby agrees to indemnify and hold MGM GRAND AIR harmless in event this representation and warranty is not adhered to.

ARTICLE 3: UNUSED CAPACITY

MGM GRAND AIR _____

CHARTERER _____

To the extent not inconsistent with any governmental regulation or order, any space in the Chartered Aircraft chartered by Charterer and not utilized by the Charterer or Charterers' passengers may be utilized by MGM GRAND AIR for the carriage of mail, cargo and/or MGM GRAND AIR personnel and property connected with the tour, without diminution of the charter price agreed to herein.

ARTICLE 4: TIMETABLE AND FLIGHT ROUTE

4.1 The timetable and flight route of the charter flight(s) set forth in the Schedule(s) or any travel documents or correspondence between MGM GRAND AIR and Charterer are approximate and shall not be guaranteed by MGM GRAND AIR. Carrier shall make every reasonable effort to perform as Charter's schedule requires. Departure times are subject to and may be altered by aircraft availability and routing, the availability of airport gate space, weather conditions, and other operational factors.

4.2 If MGM GRAND AIR determines that landing facilities at any point on the charter flight itinerary are, in its opinion, not adequate or safe for landing purposes, or if landing is prohibited or restricted by law, regulations, adverse weather or operating conditions, MGM GRAND AIR may substitute in place thereof an alternate airport at which, in MGM GRAND AIR's sole judgment, adequate and safe facilities are available and landing may be accomplished. In this event, MGM GRAND AIR will arrange, at its own expense, for the transportation of the

MGM GRAND AIR _____

CHARTERER _____

charter passengers to the originally scheduled point of destination of the charter flight, and MGM GRAND AIR shall thereby be deemed to have fulfilled its obligations under this Agreement.

ARTICLE 5: DELAYS AND DEVIATION FROM FLIGHT ROUTE

5.1 Each party to this Agreement agrees to use its best efforts to cause on-time departure of all charter flights operated in accordance with the Schedule(s) hereto. The Charterer shall make all necessary arrangements to ensure the arrival of passengers and availability of baggage for embarking and loading thirty (30) minutes prior to the departure times indicated on the Schedule(s) hereto. MGM GRAND AIR shall be under no obligation to delay departure unless so requested by the Charterer of any aircraft operating any sector of a charter flight in the event of non-arrival or late arrival of passengers or baggage or other acts or omissions of the Charterer, its employees, agents or passengers, and in no event shall MGM GRAND AIR be liable to the Charterer or any other individual for the transportation of any passenger who is not at the specified check-in point at least thirty (30) minutes prior to the scheduled departure of the charter flight. In the event the Charterer requests a delay in any departure and MGM GRAND AIR agrees thereto, the Charterer shall pay to MGM GRAND AIR all additional charges, costs and expenses incurred by MGM GRAND AIR in connection with such delay.

MGM GRAND AIR _____

CHARTERER _____

5.2 Any deviations from the flight schedule requested by the Charterer and agreed to by MGM GRAND AIR or necessitated by Charterer's actions or failure to act may entail alterations in the charter price.

ARTICLE 6. CHARTER PRICE AND TERMS OF PAYMENT

6.1 The Charterer shall pay MGM GRAND AIR for the services to be provided under this Agreement the charter price agreed to in the Schedule(s), in the manner and within the time provided therein. Any additional government taxes or charges, including departure taxes and user fees, including, but not limited to, Customs, INS, and APHIS fees, levied against MGM GRAND AIR which are not included in the Schedule(s) hereto will be submitted to Charterer for payment not later than thirty (30) days after completion of the charter flight and shall be paid by Charterer within thirty (30) days of the invoice date.

6.2 Unless otherwise provided in this Agreement, the charter price set forth in the Schedule(s) includes the costs of the aircraft with crew, fuel, oil, maintenance, appropriate meals in flight as approved by Charterer, landing fees, parking fees, ground service and dispatch costs for the aircraft. All other costs, including, but not limited to, costs for ground transportation at the place of departure and destination, costs of visa, customs duties and other taxes and fees, including the U.S. International Departure Tax,

MGM GRAND AIR _____

CHARTERER _____

security charges and other so-called departure and "Head Taxes, payable in connection with the passengers or baggage transported hereunder are not included in the charter price unless otherwise specifically indicated in the Schedule(s) hereto.

6.3 All payments are to be made in U.S. Dollars. If Charterer pays by wire transfer, the wire transfers shall be received by MGM GRAND AIR in currently available funds no later than the payment due date(s) set forth on the Schedule(s) in order to be considered timely. Charterer and MGM GRAND AIR agree that time is of the essence in payment by Charterer and receipt by MGM GRAND AIR of any and all amounts due hereunder.

6.4 Notwithstanding paragraphs 1, 2, and 3 of this Article, MGM GRAND AIR reserves the right to increase the charter price for any reason whatsoever, including, but not limited, an increase in the cost of fuel to MGM GRAND AIR upon not less than sixty (60) days' written notice to the Charterer. Cancellation by the Charterer of this Agreement within seven (7) days of notification by MGM GRAND AIR of an increase of more than 10% in the charter price shall be without penalty and without payment of any cancellation charges as provided in Article 9 of this Agreement.

6.5 Charterer shall not pledge the aircraft or the credit of MGM GRAND AIR for any purpose. The individual passengers shall not have the right to claim any refund of the

MGM GRAND AIR _____

CHARTERER _____

charter price or portions thereof from MGM GRAND AIR.

ARTICLE 7: TARIFFS, GOVERNMENTAL LAWS, REGULATIONS AND APPROVALS

7.1 MGM GRAND AIR's obligations to perform the contracted transportation shall be contingent upon and subject to the timely issuance of such approvals, clearances, permits or operating authority as may be required to be issued or granted by any government or governmental agency for the operation of the charter flights provided for herein, including, without limitations, such landing, transit, overflight and uplift rights as may be necessary from any foreign government(s) and instrumentalities thereof. MGM GRAND AIR will use its best efforts to obtain such approvals, clearances, permits or operating authority. In the event that any government or governmental agency shall fail or refuse to issue or grant the approvals, clearance, permits or operating authority referred to herein sufficiently in advance of scheduled departure to make required flight arrangements or shall, after issuance, revoke or rescind the same, or should MGM GRAND AIR be unable to perform or complete any flight due to any cause either described in Article 13.3 or beyond its control, MGM GRAND AIR may elect to terminate this contract without liability for penalties or damages. Upon such termination by MGM GRAND AIR, MGM GRAND AIR shall refund all sums received by it on account of the charter price, excepting only that portions thereof attributable to transportation theretofore

performed and such transportation as may be necessary to return charter flight passengers to their original airports.

7.2 The Charterer shall comply and shall insure the compliance by passengers with all treaties, customs, police, public health, and other regulations, including the immigration and customs laws of each country or state from, through, or to which a charter flight is operated pursuant to this Agreement. Charterer further agrees to indemnify and hold MGM GRAND AIR harmless against, and shall pay any loss, damage or expense suffered or incurred by MGM GRAND AIR by reason of any such passenger's or passengers', or Charterer's, failure to comply with any said regulation or law. MGM GRAND AIR shall not be liable for any passenger in connection with obtaining necessary documents or complying with the laws, regulations, orders, demands or travel requirements of any country or state, whether given in writing or otherwise or for the consequences to Charterer or any passenger resulting from failure to obtain such documents or to comply with such laws, etc. MGM GRAND AIR reserves the right to refuse carriage to Charterer or any passenger whose documents are not complete or who has not complied with the applicable laws, regulations, orders, demands or travel requirements, and MGM GRAND AIR shall not be liable for loss or expense due to failure to comply with the regulations listed in this paragraph.

7.3 Passports, visas, vaccination certificates and all other

MGM GRAND AIR _____

CHARTERER _____

required documents are the responsibility of the individual passenger.

7.4 Passengers are subject to search of their person and search or inspection of their property, including checked baggage, in accordance with security screening procedures, which can include an electronic detector with or without the passengers' consent or knowledge, to ensure the safety and security of the flight. Any person who does not consent to a search of his person or any property of any person who does not consent to a search or inspection of such property, may be refused transportation by MGM GRAND AIR, and MGM GRAND AIR will have no liability whatsoever to Charterer or the passenger or passengers involved.

ARTICLE 8: CANCELLATION BY MGM GRAND AIR

8.1 MGM GRAND AIR may cancel this Agreement or any affected portion thereof, by written notice, or in case the charter flight has commenced, terminate the charter flight immediately without special warning or formal notice being given to the Charterer and without liability of any kind to the Charterer, passengers and any other persons having an interest in the charter flight, in the event:

(a) That any material representation in this Agreement by the Charterer is false or any material provisions of this Agreement is violated by the Charterer or by any passenger;

MGM GRAND AIR _____

CHARTERER _____

(b) That the Charterer fails to pay the amounts due on the dates and in the manner set forth in the Schedule(s) hereto;

(c) That the Charterer commits any violation of any currently effective governmental rules and regulations or is ineligible for charter transportation under the provisions of any applicable tariffs or regulations or laws of DOT or any other applicable U.S. or foreign governmental agency;

(d) That the Charterer goes bankrupt or goes into liquidation or commits an act of bankruptcy or enters into any agreement with its creditors prior to full payment of the charter price to MGM GRAND AIR; or

(e) Of refusal or delayed granting of governmental authorization or permits required for the performance of any flight, journey or service contemplated hereby, mechanical difficulties, fuels shortages, damages to the Aircraft, adverse weather conditions, unsafe landing conditions, an act of God, Force Majeure, seizure or hijacking, quarantine restrictions, fire, flood, civil commotions, strikes or labor stoppages, war, hazards incident to a state of war, or any other cause whatsoever reasonably beyond the control of MGM GRAND AIR.

8.2 In the event of cancellation pursuant to paragraphs 1(a) through (d) of this Article, MGM GRAND AIR may collect and/or retain as liquidated damages a cancellation charge calculated in accordance with Article 9 of this Agreement.

MGM GRAND AIR _____

CHARTERER _____

8.3 In the event of termination after the commencement of a charter flight pursuant to paragraph 2 of this Article, MGM GRAND AIR may collect as liquidated damages the greater of (a) the entire balance due under this Agreement for the remaining charter flights.

8.4 The Charterer shall indemnify and hold MGM GRAND AIR harmless from claims by passengers or other persons having any interest in the canceled or terminated charter flight arising out of or in connection with such cancellation or termination.

8.5 The date of cancellation shall be the date on which MGM GRAND AIR notifies the Charterer that it is canceling this Charter Agreement or part thereof pursuant to Article 15 hereof.

ARTICLE 9: CANCELLATION BY CHARTERER

9.1 The Charterer may, by giving written notice pursuant to Article 15 hereof, effective upon its receipt by MGM GRAND AIR, cancel this Agreement. In such event, the Charterer shall pay to MGM GRAND AIR the following amounts as liquidated damages and not as a penalty:

(a) Five percent (5%) of the total charges when notice of cancellation is received by MGM GRAND AIR ninety (90) days or more before the scheduled departure date of the charter flight;

MGM GRAND AIR _____

CHARTERER _____

(b) Ten percent (10%) of the total charges if notice is received by MGM GRAND AIR sixty (60) days but less than ninety (90) days or more before the scheduled departure date of the charter flight;

(c) Fifteen percent (15%) of the total charges if notice is received by MGM GRAND AIR thirty (30) days but less than sixty (60) days before the scheduled departure date of the charter flight;

(d) Twenty five percent (25%) of the total charges if notice is received by MGM GRAND AIR fifteen (15) days but less than thirty (30) days before the scheduled departure date of the charter flight;

(e) Thirty five (35%) of the total charges if notice is received by MGM GRAND AIR less than fifteen (15) days before the scheduled departure date of the charter flight.

ARTICLE 10: ASSIGNMENT OF RIGHTS AND OBLIGATIONS

MGM GRAND AIR shall not, without the consent of Charterer which shall not be unreasonably withheld, subcontract the performance of any of its obligations hereunder except where prohibited by governmental regulation. The Charterer shall not assign its rights or obligations under this Agreement without the express written consent of MGM GRAND AIR, which shall not be unreasonably withheld.

ARTICLE 11: PASSENGER BOARDING

MGM GRAND AIR _____

CHARTERER _____

11.1 MGM GRAND AIR will accommodate only passengers so designated by the Charterer and included on the flight manifest. No refunds of charter price will be made for passengers who do not board the flight.

11.2 MGM GRAND AIR shall have the right to refuse boarding to any person: (a) who appears to be intoxicated or under the influence of any illicit or "controlled substance" drug; (b) who refuses to be subject to any reasonable checks of his person or baggage deemed by MGM GRAND AIR or responsible airport authorities as in the best interests of the security of the flight; (c) whose condition would involve hazard or risk to himself or others.

11.3 It shall be the sole responsibility of the Charterer to inform charter passengers of the foregoing conditions of transportation. Any notice by MGM GRAND AIR to passengers is a matter of courtesy and shall not relieve Charterer from its obligations hereunder to inform charter passengers.

ARTICLE 12: BAGGAGE LIABILITY LIMITS

12.1 Domestic U.S. only: MGM GRAND AIR's liability for loss or damage to, or delay in delivery of, any personal property, including checked baggage, delivered into the custody of MGM GRAND AIR shall not exceed the actual value of the property up to a maximum of $1,250 for each

MGM GRAND AIR _____

CHARTERER _____

passenger, not per baggage piece.

12.2 International only: MGM GRAND AIR's liability for loss of, damage to, or delay in the delivery of any personal property, including checked baggage, delivered into the custody of MGM GRAND AIR is limited to the lesser of: (a) the actual value of such property lost, damaged, or delayed in delivery, or (b) $20 per kilogram ($9.07 per pound), unless at the time of presenting such property for transportation a higher value is declared and an additional transportation charge at the rate of $.10 for each $100 or fraction thereof is paid over the $20 per kilogram. In the event a higher value is declared and an additional sum is paid, MGM GRAND AIR's liability shall be limited to such higher declared value.

12.3 MGM GRAND AIR will not be liable for damage to baggage which, because of the construction of such baggage (viz., soft pack - type baggage constructed of cloth, canvas, plastic or combinations thereof), would not withstand normal aircraft baggage handling procedures. Such baggage will be accepted for carriage at the sole risk of the passenger.

12.4 MGM GRAND AIR is not liable for loss or damage to or delay in the delivery of fragile, perishable articles, money, jewelry, silverware, negotiable papers, securities or other valuables, business documents or business/trade samples which are included in the passenger's checked

baggage in excess of the liability limits set forth in paragraph 1 of this Article.

12.5 MGM GRAND AIR shall be liable for checked baggage only when in MGM GRAND AIR's custody from airport to airport. Delivery of checked baggage will be made only to passenger(s) included on the flight manifest and upon presentation of personal identification. MGM GRAND AIR shall not be liable for any item of baggage or personal property if such item has not been checked into the care and custody of MGM GRAND AIR.

12.6 Any article of personal property carried aboard an aircraft by a passenger will be accepted at the sole risk of such passengers and shall be deemed to be in the passenger's care and custody even though MGM GRAND AIR's personnel may place such items in temporary storage either in overhead storage racks or other storage facilities in compliance with applicable safety regulations or for the comfort or convenience of the passengers.

12.7 No action shall be maintained for any loss, or any damage to, or any delay in the delivery of, any property or baggage, or in any other claims (other than personal injury or death), arising out of or in connection with the contracted transportation unless: (a) such action is commenced within 2 years after such alleged occurrences and (b) notice of the claim shall have been presented in writing to an office of MGM GRAND AIR within 21 days after the alleged

MGM GRAND AIR _____

CHARTERER _____

occurrence of the events giving rise to the claim, except that when international transportation is involved, notice of a claim respecting damages to baggage shall have been given within 7 days from the date of receipt, and, with respect to delay of baggage, notice shall have been given within 21 days from the date on which the baggage was placed at passenger's disposal. However, failure to give the above notice shall not be a bar if a claimant establishes to the satisfaction of MGM GRAND AIR that he or she was unable to give such notice. All claims shall be subject to proof of amount of loss.

12.8 MGM GRAND AIR has the right to refuse to accept animals for carriage on board the Aircraft. Carriage of animals may be subject to an appropriate charge therefor.

12.9 It shall be the sole responsibility of Charterer to inform charter passengers in writing of the conditions of transportation applicable to international transportation, pursuant to paragraph 2 of this Article, and Charterer hereby agrees to indemnify and hold MGM GRAND AIR harmless from any and all claims brought by passengers against MGM GRAND AIR when Charterer failed to inform said passengers in writing of said conditions of transportation.

ARTICLE 13: LIABILITY OF MGM GRAND AIR

13.1 This Agreement is for air services only, and MGM GRAND AIR's responsibility is limited solely to providing

MGM GRAND AIR _____

CHARTERER _____

the Aircraft properly manned, equipped and fueled. All other passenger services, if any, are the responsibility of Charterer.

13.2 The carriage of passengers and baggage pursuant to this Agreement is subject to the rules and limitations relating to liability established by the Warsaw Convention unless such carriage is not international carriage as defined by that Convention, and, if applicable, the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, effective 16 May 1966. "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Transportation by Air signed at Warsaw, Poland, 12 October 1929, or the Warsaw Convention as amended at The Hague, 28 September 1955, and the provisions regarding liability in the "Montreal Agreement," whichever may be applicable.

13.3 MGM GRAND AIR shall not be liable for any cancellation, delay, interruption or prevention of completion of the contracted transportation or its failure to perform any act required pursuant to this Agreement arising from any of the following: laws, regulations, requirements, acts, demands, orders, interpositions or interferences of any government or governmental authority, Force Majeure, Acts of God, sanction (financial or otherwise), seizure under legal process, hijacking, riots, civil commotions, strikes or labor stoppage (whether resulting from disputes between MGM

GRAND AIR and its employees or between other parties), fire, fog, smog, flood, weather, inability to obtain fuel, inability to obtain fuel at a cost that, in MGM GRAND AIR's sole judgment, is not prohibitive (however, MGM GRAND AIR, shall give Charterer the option to pay the excess fuel cost), quarantines, requisition of the aircraft, military emergency, war, rebellion, insurrections, hostilities or hazards or dangers incident thereto, damage or accident to or failure, mechanical difficulties or breakdown of the Aircraft or any part thereof of any machinery or apparatus in connection therewith, failure or refusal by any governmental authority to issue approvals, clearances, permits, operating, layover or traffic rights or recision or revocation thereof, or any other cause whatsoever which are beyond the control of MGM GRAND AIR. In no case shall MGM GRAND AIR be liable for any consequential or special damages arising from its performance or failure to perform the contracted transportation or any of its obligations hereunder whether or not MGM GRAND AIR has or should have knowledge that such damage might be sustained.

13.4 MGM GRAND AIR shall have no responsibility or liability for any loss, damage or delay occasioned by the acts of employees of any subcontractor of MGM GRAND AIR or employees of any airport or airport facility where the Chartered Aircraft may land or take off.

MGM GRAND AIR _____

CHARTERER _____

13.5 The Charterer agrees to indemnify MGM GRAND AIR against all claims and expenses including legal costs in respect of any liability to third persons, including, but not limited to, passengers, for any damage whatsoever arising out of or in connection with any act or omission of the Charterer, its servants or agents.

ARTICLE 14: APPLICABLE LAW

14.1 This Agreement, regardless of where executed, shall be construed in accordance with the laws of the State of California.

14.2 All actions or suits shall be brought exclusively in courts of competent jurisdiction within the State of California. Charterer agrees to submit itself to the jurisdiction of courts of competent jurisdiction within the State of California and consents hereby to accept service of process by any of the means of delivering notice under Article 15 hereof.

14.3 The illegality or non-validity of any paragraph, clause or provision contained or referred to in this Agreement shall not affect or invalidate any other paragraph or provision hereof.

14.4 MGM GRAND AIR and Charterer acknowledge that they have negotiated concerning the terms of this Article and agree that these terms constitute an essential, bargained for

MGM GRAND AIR _____

CHARTERER _____

condition of this Agreement.

ARTICLE 15: NOTICES

15.1 All notices and other communications under this Agreement (unless otherwise expressly contemplated herein) shall be in writing and in English and either delivered by hand or sent by facsimile or registered mail in each case to the following address or facsimile number of the intended recipient:

To MGM GRAND AIR:
MGM Grand Air, Inc.
Suite 350
1500 Rosecrans Avenue
Manhattan Beach, California 90266

Attention: Robert L. Gould, President
Facsimile: (310) 643-1960 or 643-1950

With a copy to:

MGM Grand, Inc.,
3155 West Harmon

MGM GRAND AIR _____

CHARTERER _____

Las Vegas, Nevada 89103

Attention: Executive Vice President & General Counsel
Facsimile: (702) 891-1114

To Charterer:

Music Guide, Inc.
c/o Padell, Nadell & Company
1775 Broadway - 7th floor
New York NY 10019

Attention: Shari Goldschmidt
Facsimile: (212) 262-2769

15.2 Such notice shall be considered served and received: (a) in the case of delivery by hand, upon delivery or upon refusal on presentation; (b) in the case of telex, upon sending providing the correct answer back is received; (c) in the case of facsimile, upon receipt of the facsimile confirmation conforming that the facsimile has been successfully transmitted provided the addressee does not within 24 hours notify the sender that it has been transmitted illegibly or incorrectly, and provided that the facsimile was not received by the addressee after 1700 hours local time of the addressee, in which event the facsimile will be deemed to be served and received on the next business day of the addressee; and (d) in the case of registered mail, upon

receipt by addressee being advised to the sender.

ARTICLE 16: CANCELLATION OF CHARTER FLIGHT DUE TO FUEL SHORTAGE

16.1 The performance by MGM GRAND AIR of this Agreement shall be subject to the availability, at the time each outbound flight is scheduled to operate, of sufficient aviation fuel at MGM GRAND AIR's usual fueling points, pursuant to existing contracts with its regular suppliers, to complete all segments of such charter and any positioning flights related thereto. Any flight cancellations made on short notice necessitated by an energy crisis will be made in accordance with the provisions of Section 404 of the Federal Aviation Act of 1958, as amended, based on the following criteria:

(a) the chronological order in which charter agreements were executed;

(b) the availability of alternate dates for each charter program;

(c) the effect of cancellation of a particular flight on other flights;

(d) the extent to which ferry operations will be required;

(e) the length of haul and/or back haul;

(f) the size of the charter group; and

(g) the type of equipment required.

MGM GRAND AIR _____

CHARTERER _____

16.2 In the event that MGM GRAND AIR cancels any flight less than sixty (60) days before its scheduled date of departure as a result of the unavailability of sufficient fuel, but has not canceled every other flight (i) contracted for after the date of the contract concerning the canceled flight, (ii) to be operated from the same point of origin as the canceled flight, and (iii) scheduled to depart within seventy-two (72) hours of the canceled flight, MGM GRAND AIR will provide a written, detailed explanation of the facts, which by application of the criteria listed above provide the grounds for such cancellation.

16.3 In the event that any flight is canceled in accordance with this provision, MGM GRAND AIR will promptly refund all charter price payments applicable to such flight made to it by Charterer, but shall not otherwise be liable for any claim against MGM GRAND AIR, its officers, directors, employees, or agents arising out of or in connection with such cancellation, whether or not such cancellation is due to any negligence by it, either of commission or omission.

16.4 The limited right of cancellation reserved to MGM GRAND AIR hereunder shall be in addition to and not in place or derogation of any and all other rights which MGM GRAND AIR may otherwise have, in law or equity, or under the Force Majeure or any other article of this Agreement to assert the unavailability of fuel as an excuse for its non-performance.

MGM GRAND AIR _____

CHARTERER _____

ARTICLE 17: HEADINGS

The headings herein are for the purpose of reference only and shall not limit or otherwise affect any of the terms or provisions herein.

ARTICLE 18: OTHER AGREEMENTS

18.1 It is understood and agreed that this Agreement contains the entire agreement of the parties with respect to the subject matter hereof; and the parties hereto agree that no party shall be bound by any provision or understanding which is not incorporated herein.

18.2 No terms or provisions of this Agreement may be changed except by written instrument signed by both parties hereto.

ARTICLE 19: MISCELLANEOUS

Unless otherwise agreed to herein, MGM GRAND AIR reserves the right to utilize its designated public relations firm(s) regarding the movement of this charter.

MGM GRAND AIR _____

CHARTERER _____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date indicated below.

MGM GRAND AIR, INC.

BY:
TITLE: Vice President, Finance and CAO
DATE:

CHARTERER

BY:
TITLE:
DATE:

MGM GRAND AIR _____

CHARTERER _____

SINGLE ENTITY
CHARTER AGREEMENT SCHEDULE A

Charter Flight Contract Number 93-055 SE
Aircraft Type DC-8
No. of Passengers 62
Charterer Music Guide, Inc.

Flight Number 1	Flight Number 2
Origination N/A	Origination N/A
Destination	Destination
Date of Departure	Date of Departure
Time of Departure	Time of Departure

Flight Number 3	Flight Number 4
Origination N/A	Origination N/A
Destination	Destination
Date of Departure	Date of Departure
Time of Departure	Time of Departure

Special Conditions: See Attachment "B:" for Flight Schedule

All wire transfer deposits and payments due hereunder shall be made in U.S. dollars by Charterer to MGM Grand Air's

MGM GRAND AIR _____

CHARTERER _____

account number 06413-00590. BA #121000358 at Bank of America, El Segundo Branch #0641, 835 N. Sepulveda Blvd., El Segundo, CA 90245, phone number (310) 568-8075. Facsimile number (310) 322-6647 or to such other account at such other bank as MGM Grand Air may hereafter designate.

CHARTER PRICE: Transportation Charges $395,000.00
Transportation Tax
Other Charges
Total Charter Price $395,000.00

Deposit Due September 7, 1993	$ 40,000.00
Balance	$355,000.00
Payment Due October 15, 1993	$355,000.00
Payment Due	

MGM GRAND AIR, INC.
By:
Title: Vice President of Finance and CAO
Date:

CHARTERER
By:
Title:
Date:

MGM GRAND AIR _____

CHARTERER _____

ATTACHMENT "B"

Contract Number: 93-055
Charterer: Music Guide, Inc.

October 24, 1993 Montreal (YXM)/San Juan
4:00 p.m.
October 27, 1993 San Juan (SJU)/Buenos Aires (EZE)
4:00 p.m.
October 31, 1993 Buenos Aires (EZE)/Rio de-Janeiro (RIO)
4:00 p.m.
November 3, 1993 Rio de-Janeiro (RIO)/Saul Paulo
1:00 p.m.
November 3, 1993 San Paulo (SAO)/Rio de Janeiro (RIO)
11:30 p.m.
November 7, 1993 Rio de Janeiro (RIO)/Acapulco (ACA)
2:00 p.m.
November 10, 1993 Acapulco (ACA)/Mexico City (MEX)
1:00 p.m.
November 10, 1993 Mexico City (MEX)/Acapulco (ACA)
11:00 p.m.
November 12, 1993 Acapulco (ACA/Mexico City (MEX)
1:00 p.m.
November 14, 1993 Mexico City (MEX)/Los Angeles
(LAX) 4:00 p.m.

MGM GRAND AIR _____

CHARTERER _____

DECLARATION OF JOHN R. SEVERSON

I John R. Severson, declare as follows:

1. At all times relevant hereto, I was the Vice President of Finance and Chief Administrative Officer of MGM GRAND AIR, INC. and I have personal knowledge of the facts and circumstances stated herein.

2. I negotiated the contract between MGM GRAND AIR, INC. and Music Guide, Inc. dated August 27, 1993 for air transportation for the Madonna "Girlie Show" tour.

3. A true and correct copy of that contract is attached hereto as Exhibit "A".

4. A copy of that contract was delivered to Music Guide, Inc., the charterer of the aircraft.

5. Under the terms of the contract, it was specifically agreed that the Warsaw Convention would apply to the transportation rendered by MGM GRAND AIR, INC.

6. Music Guide, Inc. had complete control over who would be passengers on the aircraft and had the right to change the designated passengers throughout the duration of the contract.

7. MGM GRAND AIR, INC., had only the right to refuse to accept passengers who were dangerous or who posed a threat to themselves or others.

8. MGM GRAND AIR, INC. expected that Music Guide, Inc. would advise each of the passengers whom it designated that the Warsaw Convention was applicable to the transportation.

MGM GRAND AIR _____

CHARTERER _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of May 1995 at Manhattan Beach, California

_____

John R. Severson, declarant

MGM GRAND AIR _____

CHARTERER _____

(2)

Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

No. 96-2000

In The

Supreme Court of the United States

October Term, 1996

MGM GRAND AIR, INC.,

Petitioner,

v.

MARK MICELI, ANDREA MICELI,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Four

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
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OR CALL COLLECT (402) 342-2831

20 pp

PARTIES TO THE PROCEEDING

The Petition accurately states the parties to this proceeding.

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TABLE OF AUTHORITIES

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Goldhirsch, The Warsaw Convention Annotated (Martinus Nijhoff, 1988) page 21 4

Gronfors, Air Charter and Warsaw Convention (Stockholm 1956) page 91 14

National Air Legislation and the Warsaw Convention (The Hague 1937) page 131-136 13-14

INTRODUCTION

No decision, textual or historical evidence supports the claim that a charter agreement for an international flight is a passenger ticket for purposes of the Warsaw Convention (or for any other purpose), and there is no rationale under which such a proposition can be reconciled with the Convention's objective of securing both uniform documentary practices and delivery of documentation to passengers.

The facts before the lower courts established that MGM Grand Air made no effort to issue tickets to passengers on an international charter flight, and made no effort to identify and "accept" the passengers in question, despite the fact that this is an essential function of a "carrier" for purposes of the Warsaw Convention. After plaintiff Mark Miceli was injured on one leg of the flight, MGM Grand Air attempted to invoke the liability limitations of the Warsaw Convention, notwithstanding its failure to issue or deliver tickets to passengers, arguing that a charter agreement with a company organizing the flight somehow constitutes a "ticket", and that once the charter agreement is made, the aircraft operator has no responsibility to ticket, identify or accept passengers. Under this argument, the requirement that a carrier not accept a passenger without a passenger ticket having been delivered is written out of Article 3 of the Convention for any charter flight.

Petitioner asks this Court to rescue it from its failure to make the most minimal effort to satisfy the ticketing requirements by announcing a new rule which is contrary to airline practice and unsupported by the plain language of the Convention or by any decisional authority. All authority regarding the definition and use of a "ticket" is to the

contrary, and the history of the Convention indicates that a charter operator which eschews it duty to ticket and accept passengers is not a "carrier" under the Convention and cannot invoke its protections.

Moreover, the issues posed by the Petition are moot in view of the fact that, regardless of how the charter agreement is characterized, there was no attempt to deliver it to passengers, an essential precondition to invoking liability limitations under Article 3(2) of the Convention.

STATEMENT OF THE CASE

MGM Grand Air, an air charter operator, entered into a charter agreement with Music Guide, Inc. to provide transportation for the cast and crew of Madonna's "Girly Show" world tour. Mark Miceli was video director for the tour pursuant to his contract with another entity, Music Tour, Inc. He had no relationship with Music Guide and no knowledge of the charter agreement with MGM Grand Air.

The flight originated in Los Angeles and was scheduled to make a number of stops outside the United States. Prior to departure, neither Miceli nor any other passenger was provided with a ticket, baggage check, or any notices or documentation required by the Warsaw Convention as a condition to limiting liability. MGM Grand Air left selection and acceptance of passengers to Music Guild.

During a leg between Puerto Rico and Argentina, the crew flew the plane into an area of known high turbulence. The plane was abruptly tossed about, resulting in serious personal injuries to plaintiff.

REASONS TO DENY THE WRIT

A.
THE WARSAW CONVENTION EXPRESSLY DISTINGUISHES THE PASSENGER TICKET FROM THE CONTRACT OF CARRIAGE

The Petition asserts that the Court of Appeal improperly "implied" a format provision in Article 3 of the Convention, and that the charter agreement was a ticket because it complied with the Warsaw "definition" of a passenger ticket. This is incorrect in several respects.

First, the Warsaw Convention does not define the term "ticket" but rather uses it in its ordinary sense. It specifies certain information which the ticket is required to include in Article 3, subsection 1, but these "particulars" are additional requirements, not definitional criteria for the term "passenger ticket". It has been accepted in practice, by commentators, and by the decisional law that "ticket" in the Convention carries the same functional sense as it does in ordinary practice and usage; i.e. a token of the passenger's right to carriage, to be surrendered upon boarding when the passenger is accepted for carriage.[1] The decisional law makes it clear that a passenger ticket is different from a charter agreement, and that the Warsaw Convention employs the terms "passenger ticket" and "contract" in entirely

---

[1] It is well accepted that the relationship with the carrier is created and the passenger is accepted by the carrier when the latter surrenders the passenger ticket on boarding. 13 Corpus Juris Secundum "Carriers" §499(b), page 466; Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal.App.4th 1506, 1510, 3 Cal.Rptr.2d 897.

disjoint senses. Block v. Compagnie Nationale Air France (5th Cir. 1967) 386 F.2d 323, 332; P.T. Airfast Service of Indonesia v. Superior Court (1983) 139 Cal.App.3d 162, 188 Cal.Rptr. 628.

The most authoritative decision, Block, *supra*, 386 F.2d 323, explained after examining the drafting history of the Convention that the charter agreement is irrelevant for Warsaw purposes; the critical event is "the relationship between the individual passengers and Air France, **concluded by the airline's delivery to each passenger of a personal ticket** for the flight." [*Id.* at 335] Block recognized that the ticket is not a contract but a transportation document, distinct from any contract of carriage between the carrier and passenger or charterer. Referring to the role the contract plays in the Warsaw scheme, the court observed:

> This rationale - that the flight arrangements must be based upon an agreement because only in that way can the necessary knowledge or foreseeability be achieved - implies that as long as there exists an agreement between the carrier and passenger as to transportation and as to places of departure and arrival, **any agreement between the owner carrier and a third person, the charterer, is irrelevant to Warsaw purposes.**"
> [*Id.* at 334, emphasis added]

Goldhirsch, The Warsaw Convention Annotated (Martinus Nijhoff, 1988) 21, notes that the term "ticket" carries the accepted sense of "the printed paper, usually a booklet, which evidences the contract of carriage between the carrier and the passenger. It is not the contract . . ."

The notion that the charter agreement is some sort of a "group ticket" would vitiate the carrier's responsibility to enter into a relationship with the passenger, not just some third party, and to **accept that passenger** prior to carriage and after a ticket has been delivered to and surrendered by the passenger. A charter agreement is not a ticket for purposes of the Convention since it is obviously not intended to be delivered to the passenger, nor does it indicate in any way the passenger's right to carriage. The distinction is overt in Article 3(2):

> The absence, irregularity or loss of the **passenger ticket** shall not affect the existence or the validity of the **contract of transportation**, which shall nonetheless be subject to the rules of this Convention. Nevertheless, **if the carrier accepts a passenger without a passenger ticket having been delivered**, he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.
> [emphasis added]

Contrary to MGM Grand's assertion, the instant charter agreement does not contain the "particulars" required by the Convention. Article 3 requires that the "carrier must deliver a passenger ticket which shall contain the following particulars: (a) the place and date of issue; (b) the place of departure and of destination; (c) the agreed stopping places provided that the carrier may reserve the right to alter the stopping places in case of necessity. . . "

The charter agreement contains no "place and date of

issue", since it was never issued. Nor does it indicate the place of departure and destination of the passenger. What it contains, rather, is an itinerary **for the aircraft**, not an itinerary for an individual passenger. Passengers might board or terminate their journey at any number of places. It is impossible to tell from the charter agreement where any individual passenger begins or ends his or her journey.

In fact, every reported charter case under the Warsaw Convention has involved tickets issued to and in the name of the individual passenger, demonstrating that charter operators are aware of and accept the need for the issuance of a ticket as it is generally understood, and not simply the making of a charter agreement. See Block, *supra*, P.T. Airfast, *supra*, Mertens v. Flying Tiger Lines, Inc. (2nd Cir. 1965) 341 F.2d 851, Warren v. Flying Tiger Lines, Inc. (2nd Cir. 1965) 352 F.2d 494, In re Air Crash Disaster at Warsaw, Poland (2nd Cir. 1984) 748 F.2d 94.

The Petition suggests at pages 13-14 that the plain language of Article 3 requiring "delivery" of a "passenger ticket" should be abrogated by this Court because some carriers have in certain circumstances eliminated paper documentation in favor of electronic means. Having invited this Court to re-write the Convention to eliminate the documentary requirements which lie at the heart of Article 3, Petitioner then accuses the Court of Appeal of violating the rules of treaty construction! Needless to say, Petitioner advocates a dramatic treaty revision without the slightest evidence that it would ever have been within contemplation of the drafters of the Convention.

The rule that words and phrases used in an enactment are presumed to have a meaning and to perform a useful

function, and that they are to be given their common and ordinary meaning, applies to the interpretation of international agreements. "In construing a treaty, the terms thereof are given their ordinary meaning in the context of the treaty, and are interpreted, in accordance with that meaning, in the way that best fulfills the purposes of the treaty." Xerox Corp. v. United States (Fed.Cir. 1994) 41 F.3d 647, 652. It is inconceivable that an international treaty could be altered by the decision of private parties to dispense with its express requisites.

B.
CHAN v. KOREAN AIRLINES PROVIDES NO SUPPORT FOR THE PROPOSITION THAT A CHARTER AGREEMENT SATISFIES THE TICKETING REQUIREMENT OF ARTICLE 3

Petitioner suggests that under Chan v. Korean Airlines (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113, any piece of paper that happens to contain information similar to a ticket will satisfy Article 3 so long as it is placed in the hands of some entity arranging the flight. In doing so, Petitioner distorts the holding of the case and ignores the purpose of Article 3 of the Convention.

MGM asserts that Chan states that any document would qualify as a passenger ticket under Article 3 unless it was a blank form with no information on it. (Petition, page 10) Chan does not even remotely so hold, and had no occasion to define the term "ticket" since there was a ticket delivered in that case. In fact, the language cited by MGM indicates that "passenger ticket" is a document distinct from the contract of transportation (as Block and other cases hold). Chan holds that the failure of a passenger ticket to contain all

the Article 3 particulars does not mean it is not a passenger ticket and does not, under the language of the Convention, result in loss of liability limitations. But the term "ticket" is used by the Court as having a particular meaning, whereas under Petitioner's interpretation, the term becomes superfluous and devoid of its ordinary sense.

It is well accepted that the objectives of the Warsaw Convention were to (1) secure uniformity in documentary practices; (2) limit airline liability for international flights and (3) afford adequate notice of such limitations to passengers and shippers. Block, *supra*, 386 F.2d at 327. Chan does not disagree with these objectives.

In Chan, a passenger ticket was issued to the individual passenger in accordance with accepted international practice. The issue before the Court was the penalty for failing to give notice of the Warsaw liability limitations in adequate size. The Court had no occasion to deal with the term "ticket" since there was indisputably a ticket issued to the passenger. The Court determined that the adequacy of the warning in terms of type size was not a condition of invoking the Warsaw liability limitations, based largely on the fact that the language of Article 3 differed from that of Articles dealing with limitations on damages for lost freight and baggage. The Court's interpretation was based upon the fact that the only sanction in Article 3 appears in the second clause of Article 3(2) which subjects a carrier to unlimited liability if it "accepts a passenger without a passenger ticket having been delivered". Thus, "delivery" of a ticket does not imply a ticket providing all of the information required by Article 3. Instead, loss of liability occurs in the case of a "carrier's failure to deliver any document whatever, or its delivery of a document with shortcomings was so extensive

that it cannot reasonably be described as a ticket. For example, a mistakenly delivered blank form, with no data filled in." (490 U.S. 128-129) In this case, of course, no document whatever was delivered.

The majority and concurring opinions in Chan both use the term "ticket" as having a meaning separate and independent of the "particulars" listed in Article 3. As the lead Opinion notes, "delivery of a defective document is something quite different from failure to deliver a document." (490 U.S. 132) Justice Scalia indicates in the lead Opinion that there is a difference between a passenger ticket and a passenger ticket in full compliance with Article 3. He rejects the argument that "passenger ticket" as used in Article 3(2) is shorthand for a document "consisting of all the requirements that Article 3(1) says a passenger ticket must contain". (490 U.S. 129 fn.3) The concurring Opinion of four Justices, written by Justice Brennan, cites the early drafts of the Convention which withdrew liability if the "carrier accepts a passenger without a passenger ticket having been made out, or if the ticket does not contain the above-mentioned particulars . . ." (490 U.S. 141) Thus, neither the lead nor the concurring Opinion in Chan furnishes support to MGM's argument, and the plain language and drafting history of the Convention demonstrate that "ticket" is used with its usual meaning, as reflected in custom and practice.

As the Court of Appeal aptly noted in the instant case, no one could reasonably expect the charter agreement to function as a ticket. Any number of individuals must show up at the plane with copies of the charter agreement yet have absolutely no right to board. Indeed, no person has a right to board unless and until a ticket has been issued to and surrendered by the passenger; this is the function of the ticket.

C.
THE OPINION OF THE COURT OF APPEAL DOES NOT CONFLICT WITH CHAN

MGM Grand's contention that the Opinion in this case resurrects the doctrine that lack of adequate notice of liability limitations removes Warsaw liability limitations - a rule supposedly disapproved by Chan - is baseless.

The requirement of the Convention at issue here is not that of notice of the Warsaw liability limitations, but (1) **issuance** and (2) **delivery** of a (3) **ticket** (4) **to the passenger** (5) prior to **acceptance** of the passenger by the carrier. Not one of these five conditions was met in the instant case, and thus one never reaches the issue of notice of liability limitations.

The contention that Chan disapproved of certain earlier decisions which held that adequate notice of the liability limitations is a prerequisite to the protections of Article 3, and thereby disapproved of the reasoning of Block v. Air France, is untenable. While Chan disapproved of an interpretation of Article 3 which implied that adequate notice of the passenger liability limitations was an implicit prerequisite of any limitation on liability, the reason the Court did so was because the explicit and clear language of Article 3 called only for **delivery** of a passenger ticket to the passenger prior to acceptance for carriage. It is this clear and unambiguous language which governs the instant case. Chan is thus inconsistent with Petitioner's contention that delivery of a ticket to the passenger is not a pre-condition of the liability limitation. Chan is entirely consistent with and reinforces the discussion in Block of the function and necessity of the ticket, and the irrelevance of the charter

agreement to the application of Warsaw liability limitations. Block sets forth the drafting history of the Convention as well as authorities demonstrating that a "passenger ticket" is a document separate from a charter contract. There is no conflict with Chan, which does not cite Block, much less disapprove it.

D.
THE ARGUMENTS IN THE PETITION ARE MOOT AS THERE WAS NO "DELIVERY" TO PLAINTIFF

Petitioner's arguments concerning the term "ticket" and its efforts to read that term out of the Convention and replace it with a broad concept incorporating any document with a travel itinerary and the carrier's name, are moot in light of the undisputed fact that there was no effort (or apparent intent) to deliver the charter agreement to Miceli or other passengers. It was undisputed that Miceli had no relationship with the organization which chartered the flight and no knowledge of the charter agreement.

There is no authority under which the "delivery" requirement of Article 3 can be met where there is not the slightest effort to deliver any document to the passenger, either directly or constructively, much less a document which might reasonably be construed as a passenger ticket.

Just as MGM would read the term "ticket" out of the Convention, so it would drain the delivery requirement of any meaning to prevail in this action. But the notion of delivery, like that of ticket, has a crucial function in both the Warsaw Convention scheme and transportation generally; it signifies the carrier's acceptance of that passenger for carriage, establishing the relationship between passenger and

carrier. Block, *supra*, 386 F.2d 334-336. In every case in which the Warsaw liability limitations were upheld, this function was achieved by delivery which in some manner allowed the passenger at least the opportunity to inspect the ticket and the carrier to accept or reject that individual passenger. The notion of delivery is functionally linked to that of the passenger ticket. Delivery in essence means that a ticket is provided in a manner that allows it to perform the function of notification and acceptance. MGM cannot under the facts of this case meet that requirement.

E.
THE ARGUMENTS IN THE PETITION ARE MOOT SINCE PETITIONER IS NOT A "CARRIER" WITHIN THE MEANING OF THE CONVENTION

The charter contract with Music Guide provided the latter with the responsibility for determining who would be transported on the aircraft and for giving notice of baggage loss limitations.[2] Petitioner had no apparent role in accepting individuals for carriage. The consequences of this is that MGM Grand is not a carrier entitled to liability limitations under the Convention, but simply an aircraft operator.

Liability limitations contained in the Convention

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[2] While the charter agreement required Music Guide to inform passengers of the Warsaw baggage liability limitations, it did not obligate Music Guide to advise passengers of limitations on personal injury damages. In any event, responsibility for issuing tickets and baggage checks and giving notice of liability limitations is placed on the carrier by Articles 3 and 4 of the Convention.

benefit only "carriers". See Articles 17-30; In Re Paris Air Crash (D.C.Cal. 1975) 399 F.Supp. 732; In re Air Crash Disaster at Warsaw, Poland (2d Cir. 1984) 748 F.2d 94. In essence, MGM attempted to shift to the charterer the responsibility for delivery of tickets, selection of passengers and compliance with Warsaw documentary requirements.[3] If Music Guide is the issuer of tickets and baggage checks, then it is also the carrier, and MGM is entitled to no protection under the Warsaw Convention.

Block noted that the principal commentators on the Warsaw Convention had concluded that in a charter situation where the charterer assumes ticketing or other Warsaw Convention functions for the flight, the charterer and **not the lessor or operator** of the aircraft may be considered the carrier. (386 F.2d 348-351) Thus, one commentator "concluded that the owner of an airplane should be considered the carrier with respect to the charterer, because he binds himself to perform the transportation for the account of the charterer; **the charterer would be the carrier with respect to the passengers**. The Warsaw Convention would then apply to the charterer-passenger relationship, but not to the owner-charterer relationship" in the situation where the charterer issues tickets and other necessary traffic documents. 386 F.2d 349, citing Goedhuis, Les Contrats de charte et de louage des aeronefs en connexion avec la Convention de Varsovie, 59 RDILC 687-702 and National Air Legislation

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[3] A carrier has discretion in accepting passengers even after entering into a charter agreement. Block, *supra*, 386 F.2d at 336, Cordel v. Cia. Mexicana De Aviasione SA (9th Cir. 1982) 681 F.2d 669. A carrier may reject even a ticket holder for good cause. 49 U.S.C. §1374(b), §1511(a), Ames v. Southern Pacific Co. (1904) 141 Cal. 728, 75 P. 310, 311.

and the Warsaw Convention (The Hague 1937) 131-136.

Another commentator states that "When the functions of a Warsaw carrier are divided, the party exercising the most important function has the status of carrier. 'If the aircraft owner would in any case really have no practical possibility of issuing transportation documents, the Convention can no longer apply.'" (395 F.2d 350-351, citing Gronfors, Air Charter and Warsaw Convention [Stockholm 1956] 91) In this view, "the possibility to issue transportation documents is the most important function in view of the severe penalties attached to non-compliance." (386 F.2d 350-351 fn. 62)

Block concluded that Air France was a carrier because it not only assumed contractual responsibility for transport of passengers and controlled the aircraft, but because

> A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention.
> [*Id.* at 353]

MGM Grand is not a carrier within the meaning of the Convention, for by its own admission it attempted to shed itself of the most essential carrier functions under the Convention: the issuance of passenger tickets and other travel documentation, and the acceptance of passengers.

CONCLUSION

Ordinary language, unanimous precedent and the history of the Warsaw Convention all indicate that the term "passenger ticket" refers to documentation customarily issued by carriers to passengers, signifying that individual's right to passage, and the surrender of which signifies the carrier's acceptance of the individual for passage.

Petitioner's interpretation of Chan rewrites the Convention by eliminating the provision removing liability limitations "if the carrier accepts a passenger without a passenger ticket having been delivered." This provision, like the term "passenger ticket" and the delivery requirement, become meaningless under MGM Grand's construction of Article 3, since there is no way of distinguishing who the carrier "accepts" or to whom it has "delivered" a ticket.

Respondents therefore submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 24 1997
CLERK

No. 96-2000

IN THE

Supreme Court of the United States

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Respondents.

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TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITIONER'S REPLY BRIEF

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Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

14 pp

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

1. MICELI IMPROPERLY CONFUSES THE ISSUE OF DELIVERY WITH THE ISSUE OF WHAT CONSTITUTES A TICKET UNDER THE WARSAW CONVENTION

In his Opposition, MICELI argues that no ticket was delivered to him and therefore the question whether or not the Charter Agreement is or is not a "ticket" within the meaning of the Warsaw Convention is 'moot.' Opposition p. 11 et seq. MICELI also argues that the California Court of Appeal does not conflict with this Court's decision in *Chan v. Korean Airlines,* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 because this Court stated that delivery of a ticket was required.

What MICELI seeks to do is confuse two entirely separate issues. They are:

1. Does the Charter Agreement meet the requirements of Article 3 of the Warsaw Convention?
2. Was there sufficient delivery?

In the petition for certiorari, MGM focuses on the first issue, was there a "ticket," because that is the only issue which the California Court of Appeals purported to decide. The second issue of "delivery" is discussed in the petition only to the extent required because the California Court of Appeal, like MICELI, declined to distinguish between the two issues. In doing so, MICELI seeks to reverse the decision in *Chan, supra* and take the law back to the notion that the Warsaw Convention requires some

sort of actual or "adequate" notice of its application.

For instance, at page 8 of the Opposition, MICELI states that "the objectives of the Warsaw Convention were to (1) secure uniformity in documentary practices; (2) limit airline liability for international flights and (3) **afford adequate notice of such limitations to passengers** and shippers" and cites *Block v. Compagnie Nationale Air France* (5th Cir. 1967) 386 F.2d 323 in support of that statement. MICELI then baldly asserts that this Court's decision in *Chan, supra*, "does not disagree with these objectives."

> MICELI apparently misunderstands *Chan*. "For the reasons given above, we agree with the opinion of the Supreme Court of Canada, see *Ludecke v. Canadian Pacific Airlines, Ltd.*, 98 D.L.R.3d 52 (1979), **that the Warsaw Convention does not eliminate the limitation on damages for passenger injury or death as a sanction for failure to provide adequate notice of that limitation.** Accordingly, we affirm the judgment of the District of Columbia Circuit." *Chan, supra* at p. 135 (emphasis added)

2. THE CHARTER AGREEMENT COMPLIES WITH THE REQUIREMENTS FOR A TICKET

The Warsaw Convention's aim of "uniformity" in travel documentation does not require that every airline's documents must be exactly like every other airline's documents. The Warsaw Convention only seeks uniformity to the extent that all "tickets" should contain certain specific information. It goes no further. The

Warsaw Convention does not define the term "ticket" but does state that the travel document referred to as a "ticket" must be a document which contains:

> "(a) The place and date of issue;
> "(b) The place of departure and destination;
> "(c) The agreed stopping places . . .;
> "(d) The name and address of the carrier or carriers;
> "(e) A statement that the transportation is subject to the rules relating to liability established by this convention." Warsaw Convention Article 3(1).

The charter agreement contains all of the information required of a ticket under the Warsaw Convention./[1] In deciding *Chan*, *supra,* this Court discussed what documentation would qualify as a "passenger ticket" and was quite clear in its statement.

> "Thus, a delivered document does not fail to qualify as a 'passenger ticket,' and does not cause forfeiture of the damages limitation, merely because it contains a defective notice. When Article 3(2), after making this much clear, continues (in the

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1. MICELI seeks to add an additional requirement, that the "ticket" must be issued to an individual passenger and argues that in all of the reported cases involving charter flights, individual passenger tickets were delivered to the passengers. MICELI then asserts that the charter contract cannot be a ticket. The argument begs the question. In none of the cases cited by MICELI was there an issue of what constitutes a "ticket" and they are therefore not precedent for this case. It further points out the need for this Court to intervene since the question of what constitutes a ticket is misconstrued in the reported opinion of the California Court of Appeal.

> second sentence) 'Nevertheless, if a carrier accepts a passenger without a passenger ticket having been delivered, etc.' it can only be referring to the carrier's failure to deliver any document whatever, or its delivery of a document whose shortcomings are so extensive that it cannot reasonably be described as a 'ticket' (for example, a mistakenly delivered blank form, with no data filled in). Quite obviously, the use of 8-point type instead of 10-point type for the liability limitation is not a shortcoming of such magnitude; indeed one might well select that as a polar example of what could not possibly prevent a document from being a ticket." *Chan, supra* at pp. 128 - 129.

The Charter Agreement is not a blank form with no information filled in. In fact, it sets forth the required information in full 12-point type. The place and date of issue, August 27, 1993, Manhattan Beach, California (Appx. I-1); The place of departure and destination (Appx. I-29); The agreed stopping places . . . (Appx. I-29); The name and address of the carrier or carriers (Appx. I-1, I-21) and; A statement that the transportation is subject to the rules relating to liability established by the Warsaw Convention is set forth in a full paragraph in 12-point type under the heading "LIABILITY OF MGM GRAND AIR." (Appx. I-17 to 18).

The Charter Agreement fully complies with all of the requirements *which the Warsaw Convention* imposes. Despite the clear language from *Chan, supra*, the California Court of Appeals stated:

> "We further hold that the charter agreement is not a 'passenger ticket' for all who board an aircraft under the Warsaw Convention. In this particular situation MGM 'accept[ed] a passenger without a passenger ticket having been delivered.' Since MGM did not adhere to the provisions of the Convention by issuing *individual* 'passenger tickets,' it is thereby 'not entitled to avail [itself] of those provisions of the Convention which limit its liability.'" *Miceli v. MGM Grand Air,* 51 Cal.App.4th 702 (1996) Appx. C-10, emphasis added.

Clearly the Court of Appeals has misconstrued or ignored this Court's decision in *Chan*. Further, contrary to MICELI's argument in his opposition to the petition for *certiorari,* the opinion of the California Court of Appeal does conflict with this Court's decision since the charter agreement would qualify as a passenger ticket under *Chan* but is held not to so qualify under *Miceli v. MGM Grand Air.* [2]

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2. This Court should also consider that the California Court of Appeal and MICELI contend that a "ticket" is the item that is surrendered to the airline immediately before boarding. However, the document surrendered at the boarding gate is actually a flight coupon which is but one item in the documentation generally in use in the United States. The flight coupon itself ordinarily does not have all of the information required by the Warsaw Convention. The Warsaw notice is ordinarily contained in the jacket and cover sections of the packet in which the flight coupons are enclosed. Thus, the "ticket" is in fact the entire package consisting of the jacket, cover, notices, flight coupons and itinerary and the "ticket" is not surrendered. Only the flight coupon is surrendered. Thus, it is clear that the issue boils down to whether or

3. THERE WAS SUFFICIENT DELIVERY UNDER THE WARSAW CONVENTION

MICELI argues that, irrespective of this Court's decision whether or not the Charter Agreement has the required information under the Warsaw Convention, the question is moot since the document was not "delivered" to MICELI. In support of this argument, MICELI asserts that there was no relationship between himself and the charterer. This cannot be the case. The charterer, Music Guide, Inc. arranged transportation for the "Girly Show" Tour participants, including MICELI. He cannot expect any court to take seriously his claim that there existed "no relationship" between himself and the charterer. To accept such a claim would be to determine that MICELI found himself on the aircraft, traveling about the planet with Madonna by mere happenstance.

Further, even the cases cited repeatedly and devotedly by MICELI, especially *Block v. Compagnie Nationale Air France*, (5th Cir. 1967) 386 F.2d 323, make it clear that a substantial relationship exists between the charterer (Music Guide) and the passengers. It was part of the rationale of the *Block* court that "there is no Warsaw objection therefore to a third person *acting as the agent of passengers* or entering into a contract with the carrier for the benefit of the passengers ('*stipulation pour autrui*). *Block, supra* at p. 332. MICELI has quoted carefully edited portions the following language from *Block* at every stage of the proceedings herein:

---

not the Warsaw Convention requires a "ticket" to have a particular format, with flight coupons, or not.

> "The fatal flight developed out of three sets of contractual relationships: first the relationship between Air France and the Atlanta Art Association, created by their 'International Charter Flight Agreement'; **second, the more informal set of relationships between the Art Association and the individual passengers**; and third, the relationships between the individual passengers and Air France, concluded by the airline's delivery to each passenger of a personal ticket for the flight." *Block, supra* at p. 336.

Clearly, there is in fact and in law a relationship between the passenger, MICELI and the charterer Music Guide whether Mr. MICELI chooses to recognize it or not. This relationship is of significance to the question of delivery. In the only reported case directly on point, it was held that delivery of the ticket to the person who made the travel arrangements for the passenger was sufficient delivery, whether or not the passenger ever took possession of the ticket or ever read the language related to the applicability of the Warsaw Convention. In *Ross v. Pan American World Airways* (1949) 299 N.Y. 88, 85 N.E.2d 880, the Court noted that the liability limitation would be of a benefit to passengers as tending to lessen litigation and would benefit carriers by providing a more definite basis on which to obtain insurance and would lower operating expenses which in turn would inure to the benefit of passengers by way of lower rates.

> "Those aims would be poorly served by any holding that the limitation of liability is available only when a carrier can produce affirmative proof not only that the

> passenger ticket complied with the Convention, but that the individual who bought the ticket at the carrier's ticket counter, was the passenger himself or someone specifically authorized by the passenger to consent, on the latter's behalf to limited liability.
>
> "Coming back to the undisputed facts of the case we have before us, let us remember that, as to defendant, this was a routine sale, in the ordinary course of its common carrier business, of a ticket which nominated appellant as the intending passenger. If there was here any failure to adequately inform appellant of her subjection to the Warsaw Convention, that failure was not the defendant's - and yet, if we were to hold that there was, somehow, lack of appropriate 'delivery' here, Defendant would be the loser. Putting it another way: it was no concern of the carrier as to what the arrangements were between the passenger and the person who took delivery of the ticket." *Ross, supra* at pp. 97-98.

Further, as noted in the *Block* case, the charterer, Music Guide, was acting as the agent for the passengers, including MICELI, in arranging the travel. An agent is someone who acts on behalf of someone else in dealings with a third party. *California Civil Code* § 2295. Agreements reached between an agent and a third party are binding on the principal. *California Civil Code* § 2330. An agency is created either prospectively by agreement between principal and agent or may be created

retroactively when the principal ratifies the acts of the agent. *California Civil Code* § 2307. Retroactive agency is established by the acts of the principal in accepting or retaining the benefits of the transaction arranged by the agent. *Vanciel v. Kumle*, (1945) 26 Cal.2d 732, 160 P.2d 802.

Clearly, Music Guide was acting as the agent of MICELI and all of the tour participants when it negotiated the charter. Delivery of the charter agreement to the agent, Music Guide, was constructive and sufficient delivery to the principal, MICELI. Certainly, the agency relationship was created by ratification when MICELI boarded the aircraft in Montreal and thereby took the benefits of the arrangement made on his behalf by Music Guide.

In short, while delivery was purportedly not decided by the California Court of Appeal, there is certainly an issue as to the sufficiency of the delivery. While MICELI contends in his brief that the question of what constitutes a ticket is moot because there was no delivery of any document, he ignores legal precedent and general agency laws in making that assertion. There was sufficient delivery.

4. CONCLUSION

In his opposition, MICELI confuses the question of what constitutes a ticket under the Warsaw Convention with what is required for delivery. Since the California Court of Appeals decision purports to decide only what constitutes a ticket, the matter of delivery is irrelevant.

MICELI incorrectly argues that the decision of the California Court of Appeal does not conflict with this Court's decision in *Chan v. Korean Airlines,* (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113. Clearly the charter agreement would qualify as a passenger ticket

under the *Chan* case. Yet, MICELI argues, and the California Court of Appeals agreed, that a ticket must be a document which one surrenders to the carrier before boarding the aircraft. A ticket has a particular format and is issued to a specific individual under the decision of the lower court even though the Warsaw Convention has no requirement that the ticket be issued to a specific person, no requirement that the passenger's name even be part of the ticket and no requirement that the ticket have a particular format. All such requirements are implied by the lower court's decision.

Finally, although MICELI argues that there was no delivery to him, such personal delivery is not required by the Warsaw Convention. Constructive delivery such as occurred here should be sufficient. If actual delivery is a requirement of the Warsaw Convention, the method of ticket sales in the nation must be radically changed. The carrier would have to ensure that the passenger himself was handed the ticket and travel agencies will be a thing of the past.

Therefore, MGM GRAND AIR, INC. respectfully requests that this Court issue a writ of certiorari to the California Court of Appeal to review its decision and opinion in this action.

Respectfully submitted,

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